THIS ISSUE OF THE JOURNAL CONSISTS OF TWO PARTS—THIS IS PART I

AMERICAN BAR ASSOCIATION

JOVRNAL

MARCH, 1927

Higher Standards for Admission to Law Study Urged

Cooperation of Press and Bar to Date

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CURRENT LEGISLATION—CURRENT LEGAL LITERATURE—STATE BAR NEWS

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THE TRAVELERS
HARTFORD, CONNECTICUT

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Congressional Power to Repeal Volstead Act

THE argument that Congress, having performed its duty under the 18th Amendment by passing the Volstead Act, is not at liberty to repeal that measure, was made by Hon. William Gibbs McAdoo in an address at the midwinter meeting of the Ohio State Bar Association in January. The following extract from that address will prove of interest:

"Had Congress never passed an enforcement act at all it would, of course, not be in the power of the courts to correct this breach of duty by mandamus. But since Congress has passed a valid and constitutional enforcement act, thereby performing the affirmative duty imposed by the Eighteenth Amendment, any act by Congress in breach of this duty would be unconstitutional. While the courts would not be in a position to correct this breach if Congress had never acted, they are in a position to do so where Congress, having acted by passing the Volstead Act, for instance, later undertakes to undo that action by repealing it. For in such case, the courts do not have to compel any affirmative action by Congress; all that they are required to do is to say whether or not the repealing statute is constitutional and valid, and I submit that they would be bound to say that it was not. If Congress is under an affirmative constitutional duty to pass a statute, and does so, and then violates its duty by repealing that statute, or by substituting therefor an unconstitutional statute, it is a breach of duty which the courts are bound to correct, as they are bound to correct any other breach of constitutional duty where they can acquire jurisdiction of the question; and they can acquire jurisdiction in such a case because all that they are required to do is to declare a statute, namely the repealing statute, unconstitutional and thus leave the former statute, the Volstead Act, in full force and effect. In short, if the opponents of prohibition were successful in having the Volstead Act repealed by the substitution of another act permitting light wines and beers, they would have secured merely an unconstitutional statute whose unconstitutionality would cause the Volstead Act to remain in full force and effect. This doctrine was declared as far back as 1860 by the Supreme Court of Wisconsin, in the case of *Bull v. Conroe*, 13 Wis. 260, at 265, where the court said:

"'Although the failure of the Legislature to perform a positive constitutional duty may be a wrong without a remedy (since the courts possess no power to compel the Legislature to enact laws) yet when such duty has once been executed, the Legislature is deprived of all future power to leave it wholly unexecuted; and whilst it may within constitutional limits vary or modify the laws by which that duty has been once performed, it cannot totally repeal them without the contemporaneous passage of substitutes.'

"The whole force and effect of this language would be destroyed if we did not understand the word 'substitutes' to mean valid and constitutional substitutes."

Firearms Regulations Act Proposed by Committee of National Crime Commission

THE Special Committee on Firearms Regulation of the National Crime Commission, after hearings at which police and prosecuting officers and others interested in the subject were given an opportunity to present their views, has prepared a draft of an act "to regulate the sale, possession and use of firearms, silencers and noxious gases," which is recommended to the states for adoption. The draft begins with definitions carefully prepared in view of all the latest developments of the subject and intended to prevent escape or evasion on that score. It provides additional penalties for the commission of a crime of violence when armed, which increase in severity with the second, third and fourth offenses committed under such circumstances. In the case of a fourth or subsequent conviction for a crime of violence so committed the penalty is to be imprisonment for life or an additional period of not less than twenty years. In the trial of a person for committing or attempting to commit a crime of violence "the fact that he was armed with or had available a pistol without license to carry the same, or was armed with or

had available a machine gun, shall be prima facie evidence of his intention to commit said crime of violence." And the presence of a firearm in a vehicle is declared to be presumptive evidence of possession by all persons using or occupying the vehicle at the time.

Anyone who has been convicted of a crime of violence is forbidden to purchase, own or have in his possession a pistol or machine gun on penalty of imprisonment of from one to five years in the penitentiary. Manufacturers and jobbers are required to register with a State official to be designated, who may refuse registration for what appears to him good reasons, from which decision an appeal lies to the proper court. Such manufacturers and jobbers must keep a detailed record of all firearms sold by them, which information is to be available to police and other public officials in discharge of their duty. Retail dealers are to be licensed and there are detailed provisions for their operation. They must not place a pistol or advertisement of pistols in a place where it can readily be seen from the outside. They must keep a true record of every pistol sold on the form provided by the responsible State official. No pistol is to be sold unless the purchaser has a permit to buy it; until seven days have elapsed after the application for the permit; unless the purchaser is known to the retailer or establishes his identity; and unless the pistol shall be unloaded and securely wrapped. There are further provisions imposing a penalty for knowingly selling a pistol to minors, insane persons and drug addicts, and persons convicted of a crime of violence, even if they have obtained a permit.

The proposed act provides for a permit to purchase, although "the members on the committee representing the small arms manufacturers and the rifle and revolver associations dissent from the requirement of any permit to purchase." The majority of the committee, however, are of the opinion that the section does not seriously impose any requirement which is open to serious objection on the part of any person wishing to purchase a pistol for a lawful purpose. The section reads in part: "No person of good character and who is of good repute in the community in which he lives, and who is not subject to any of the disabilities set forth in other sections of this act, shall be denied a permit to purchase a pistol. The Justice of a court or a Trial Justice, the Sheriff of a County or the Chief of Police of a City or Town, shall upon application issue to any person qualified under the provisions of this section a permit to purchase a pistol, and the (chief police officer of the state or other responsible state official) shall have concurrent jurisdiction to issue such permit in any case, notwithstanding it has been refused by any other licensing official, if in his opinion the applicant is qualified." Applications shall be in the form prescribed, giving full information, and "shall contain as references the names and addresses of two reputable citizens personally acquainted with him."

Section 10, covering license to carry, is drafted in a similar spirit. Judges and certain other officials are authorized to issue licenses to carry a pistol for not more than one year from date of issue to persons having a bona fide residence or place of business in the jurisdiction of the licensing authority, or persons having bona fide residence

or place of business within the United States and license to carry a pistol issued by the authorities of any state or subdivision of the United States, "if it appears that the applicant is a suitable person to be so licensed and that he has good reason to fear an injury to his person or property or has any other proper reason for carrying a pistol." There are various detailed provisions as to the form and issue of this license. Unlicensed persons are forbidden under penalty to cary pistols concealed in vehicles, exception being made of certain officials and their deputies and other persons naturally exempted from such restriction. Giving or causing to be given false information in applying for permit to purchase or license to carry is made perjury.

The manufacture, sale, purchase or possession of a machine gun is punishable by not less than five years imprisonment, but the provisions of this section do not apply to the United States or political subdivisions thereof or to foreign governments or in general to those discharging military or police functions. "Nor shall the provisions apply to banking institutions established under the laws of this State or of the United States, or to public carriers who are engaged in the business of transporting mail, money, securities or other valuables, provided, however, that a permit to possess and use such machine gun is first secured. . ."

The manufacture, sale, purchase or possession, except for police or military purposes, of silencers is prohibited under penalty. There are further provisions dealing with bombs and noxious gases, designed to check the use of explosives and poisonous gases by criminals who are beginning to resort to such devices. Alteration of identifying marks on firearms is prohibited for obvious reasons. Advertising of pistol or machine gun for sale or delivery in any other manner than that prescribed by the Act is forbidden. There are additional provisions for confiscation of firearms unlawfully possessed, carried or used, it being declared that no property right shall exist in such weapons. In case of conviction under the Act of a person not a citizen, the same is to be reported to the proper officer of the government having supervision of the deportation of aliens. If any part of the Act is declared void, such invalidity is not to affect the remaining portions.

Digest of Important Federal and State Legislation

THE report of the Association's Committee on Noteworthy Changes in Statute Law, containing an annual digest of important Federal and State Legislation for 1926, has been printed in a neat pamphlet. At the time of the presentation of the Committee's tentative report to the meeting at Denver the 1926 sessions of Congress and the State Legislatures were still in progress and very few enactments were available for the Committee's consideration. However, this material was subsequently supplied and is interestingly digested and appended to the later report. One of the notable features of the legislation of 1926, we are told, is the contribution which has been made to the formulation of many laws by persons who were not themselves legislators.

HIGHER EDUCATIONAL STANDARDS URGED FOR ADMISSION TO LAW STUDY IN N. Y.

New York Court of Appeals Holds Public Hearing at Albany at Which Prominent Members of Bar Urge Two Years of College Work as Preparation for Law Study—Meeting Held as Result of Petitions of Bar Association of New York and New York County Lawyers' Association—President Whitman Submits Memorandum for American Bar Association—Up-State Opposition Develops—Striking Memorandum Showing Inadequacy of Present Preparation of Many Law Students—Opportunities for College Education

ON MARCH 4th, 1927, there was a hearing held in the Court of Appeals at Albany, New York, on the proposal to raise the educational requirements for admission to the Bar of that State. This hearing was held on the petition of the Bar Association of the City of New York and that of the New York County Lawyers Association. There was a very large attendance of lawyers, educators and prominent members of the profession interested in questions involving the education of the lawyer. Mr. George W. Wickersham, Ex-Attorney General of the United States, Samuel Seabury, formerly Judge of the Court of Appeals, John W. Davis, Chairman of the Committee of Legal Education of the New York Lawyers' Association, and numerous men prominent in the profession urged on the Court the strong advisability of increasing the educational requirements imposed upon candidates in the study of the law to at least two years of college work. Mr. John W. Davis presented the statement of the American Bar Association, as submitted by President Whitman, urging the standards for admission to the study of law adopted by the Association. A very effective address was made by Dr. Frederick B. Robinson, Acting President of the College of the City of New York, dealing with the subject of the opportunities that now prevail throughout the United States, and especially in New York State, in colleges wherein are provided free scholarships, student loan associations and other forms of aid for worthy, indigent students. This address consisted largely of a statistical survey of the sums devoted to this purpose by private benefactors as well as by State and Municipal aid. It left little room for doubt as to the magnificent generosity of the American people in developing opportunities in extending the higher education of the youth of the land.

There was also a very substantial insistence on the part of the speakers that the examination as to character and fitness of candidates should take place before the student actually enters upon his legal education. Substantial attention was also paid to the facts surrounding the activities of our business and social life at present, showing that the requirements for the modern lawyer are exceedingly complex and diversified. There was also the hope expressed that a higher standard of education would be reflected in the character of the legislation that would be adopted by the various state governments of the United States as well as by the Congress and that such higher education would inure to more intelligent and a less partisan result.

Mr. George F. Canfield, of the Association of the Bar of the City of New York, Judge Garvin of the Brooklyn Bar Association, Meier Steinbrink of the Brooklyn Committee on Character and Fitness, Ignatius M. Wilkinson of Fordham University Law School, Dean Charles K. Burdick of the Cornell University Law School, and Dr. Augustus S. Downing, Deputy State Commissioner of Education, were among those who spoke in favor of higher educational requirements. The New York University Law School, of which Frank H. Sommer is Dean, presented a brief on the same side. Mr. Henry W. Jessup, of New York City, urged an intimate knowledge of standards of professional ethics, and an oral examination on that subject during the first year of law study. Dean William P. Richardson, of the Brooklyn Law School, presented a brief urging two years study in college, or its equivalent, and three years of law school study. Miss Ruth Lewinson spoke for the New York Council of the National Women Lawyers' Association and favored a college degree or its equivalent.

The only opposition which developed was on the part of prominent members of the Bar in up-State counties. These members of the profession insisted that there was a scarcity of lawyers prevailing in the agricultural sections of the State and that if the requirements were raised it would result in considerable embarrassment to young men in their districts and in many places would result in debarring worthy candidates from the profession. The opposition was led by Mr. Robert Averill and Mr. John Raines, representing the Rochester County Bar Association, who filed a resolution adopted by that Association against the proposition. Mr. Raines said that a college education requirement might be all right for students in the First and Second Appellate Division, but that up-State there was a different situation, where it was impossible for many young men to obtain a college education. Mr. John E. Mack of Dutchess County also opposed the requirement of a two-years' college course, as did Mr. Henry W. Shidrane, President of the Orange County Bar, Mr. Frank Pedlow, of the Albany County Bar, and Gleason L. Archer, Dean of the Suffolk Law School of Boston.

Time to Determine Fitness, Character and Qualifications

The memorandum submitted in behalf of the Association of the Bar of the City of New York and the New York County Lawyers' Association, signed by Judson Hyatt, urged that the examina-

tion of an applicant as to character and fitness and qualifications to proceed with the study of law should be made at the time of application and not after notification of his successful completion of the examination for the Bar; also that the powers of this Committee be of wider scope than at present. We quote:

"The present examination as to character and fitness of candidates is carried on at a time after the completion by the candidate of a course in law school and after notification is given of his successful passing of the bar examination. At this late time, he has made a considerable outlay in funds for law school tuition and bar examiners' fees. This condition breeds, in the minds of the examining committee, a tendency to 'stretch a point' in the candidate's favor. Moreover, there is little use at this late time of asking questions on history, government or political theories, the structure of the State, or the rise of the merchant class. This sort of thing is unfair to the candidate and has slight bearing on his moral character. Moreover, it makes the committee on character, if it debars the applicant, an agent in discrediting the law school and college which has turned out the candidate.

"It is therefore submitted that this examination should precede the study of law, however much it might tend to deprive the law school of fees. Further, this examination should bear an import that would tend to dissipate the mechanistic 'short cuts' to the profession, and in stating this, we do not urge that the examination should be conducted upon any narrow principle, but wholly in a spirit of liberality in ascertaining the fitness of the candidate. If the candidate is a graduate in arts or science from some College or University, that should tend to shorten the examination, because we believe, thoroughly, that modern College training tends to develop character. The primary requisite of character as well as adaptability and liberality in social relationships, which the College tends to give is ability and the tendency to work intelligently.

"If the candidate presents no College degree, which it is admitted is merely presumptive evidence of fitness, we believe there should be either (a) proof furnished of High School graduation and, further, by a certificate of College or University, proof of satisfactory completion of at least two years' work in value of counts, in Government (both comparative and our own), Economics, History, Constitutional (both Federal and State) Law, International Law, and in the forms of Local Government; or (b) pass an examination in the subjects named, assuming a High School graduation or College entrance certificate is furnished. Omitted these prerequisites, which we believe represent minimum conditions of entrance into the study of law, the unfitness in one respect would be established.

"Of course, there is no suggestion that any law school may not admit students, without these preliminaries being observed, who desire merely to pursue legal studies for cultural reasons.

"When, therefore, the Committee on 'Character' meets, its duty would be of wider scope than the power exercised at present, and, indeed, it would be a much more efficient and respected instrument of the State."

Higher Requirements Will Be Met by Students

Assuming that applicants will take at least two years of college work in political and social science, the memorandum expresses the view that "the extension of the quantum of purely legal education beyond that now prevailing is not necessary at present." However, if no college work is required, "the law school education as now given in New York City and elsewhere is in some substantial respects wholly inadequate." The memorandum further points out the facilities now offered for obtaining the preliminary training proposed and declares that "the poverty of a candidate does not present an insurmountable obstacle, either in obtaining a complete college and law school education or at least a substantial foundation for professional work." And that the proposed higher requirements will be met if they are imposed is strongly suggested by this extract from the memorandum submitted to the Court of Appeals by the faculty of New York University Law School:

'It may interest the Court to know that, having announced for three years that we would increase our requirements, we naturally expected the last year (1923) of the High School requirement would result in an increase in the number of entering students. The class entering that year numbered 711. In 1924 (with the one year requirement in force) our entering class was 612, a 14% loss from 1923. In 1925 it was 791 or an increase of 10% over 1923.

"Most astonishing of all is the fact that in 1926 when the two year requirement went into effect the entering class was 689, a loss from 1923 of only 3%. We therefore conlude that prospective law students, in New York City at least, will meet any reasonable requirement which may be imposed by the law schools and/or this Court.

"We believe that the requirement of two years of college work is logical because it coincides with the cleavage which has developed in colleges at the end of the sophomore year between the undergraduate and graduate subjects and methods of instruction." . . .

Ignorance and Low Calibre of Many Applicants

The report submitted by the Committee of Character and Fitness of the First Judicial Department is also very illuminating. This report was prepared and presented to the Appellate Division on May, 1926, and was presented to the Court of Appeals at the suggestion of that Division. The statement of Mr. Alan Fox, dated Jan. 10, 1927, which accompanies that report, sets forth conditions as to the general education of many applicants as follows:

"No one who has not looked at these applicants with his own eyes and listened with his own ears to their examinations before the Character Committee could credit the ignorance and low general calibre of the mass of boys who are swarming into the law, that is, the mass of the non-college applicants. Of the more than 800 boys who were before the Character Committee of the First Department during 1926 about 45% were college men. These college men generally appeared well fitted in character and education for admission. Of the balance, the non-college men, the great majority were very ignorant and very low grade.

"An Applicant for admission to the New York bar must, speaking generally, have graduated from an accredited High School before beginning law study, then graduate from a law school and then pass the Bar Examinations. Of those who take the Bar Examinations about 40% pass. These boys, the 40%, then come before the 'Committee on Character and Fitness,' appointed by the Appellate Division, whose function it is to look over the boys and certify to the court as to their fitness for admission. The Committee examines each applicant with all possible care, first through its secretary and investigators and then by a personal hearing. If there is no specific blot on the boy's record, if he has been convicted of no crime or specific act of dishonesty he is generally passed as to character. There are many whose appearance and manner make a bad impression on the Committee and whom the Committee would like to reject if it could discover an appropriate ground. If, however, a boy has worked his way up to this point, that is, has passed his Regents' examinations, studied law at perhaps a family sacrifice for three years, passed his Bar Examinations, the Committee rightly hesitates to reject him merely on the ground that his face and manner give a general impression of his being poor stuff, that is, of his being perhaps shifty or unreliable or untrustworthy or perhaps undeveloped. It would be pretty drastic for the Committee to refuse him admission to the profession for which he has prepared himself and change the whole current of his life merely because they do not like his looks and distrust his character. There must be some specific blot on his record to warrant the Committee in rejecting him on character grounds and so not only bar him from his chosen work but put a stigma on his reputation. I have no doubt that we pass many boys who will soon be up before the Grievance Committee merely because there is no specific evidence of misconduct to serve as a legitimate basis for turning them down.

"Many boys, however, who are passed by the Committee as to character are postponed for varying periods because of their total lack of general elementary education. When I say a total lack of education I mean that they cannot

answer the very simplest questions on the most elementary subjects, such for instance as American history and literature. Most of them do know who George Washington was but they cannot tell who Hamilton was, or Jefferson, or Andrew Jackson and say that Daniel Webster was a man who wrote a dictionary. One recent candidate told us that the Battle of Marathon was the fight between the Monitor and Merrimac. As to English history and government and the development of English institutions and the common law, their mind is a blank. The Magna Charta, Queen Elizabeth, Oliver Cromwell mean little to them. If questioned on literature they do not know whether Thackeray was poet, novelist or Prime Minister.

"Private Life of Helen of Troy" as Biography

"They have read the 'Tale of Two Cities' because it was required in school but they generally do not know what the two cities were or remember anything about even that one book. If asked whether they have ever read any biography, some of them this fall have been answering, 'Yes, the "Private Life of Helen of Troy."' There is one book which every candidate seems to have read—'An American Tragedy,' but most of them can hardly name any of the great English writers and poets of the past. It has been difficult to understand how boys who have graduated from the New York City High Schools and passed the Regents' examinations can fall down so completely when asked by us the simplest questions on primary educational subjects such for instance as American History and Civics. It is not lack of intelligence, for almost all of the boys impress us as of unusual native intelligence. I do not think it entirely the fault of the High Schools, for one of the large High Schools, whose boys chance to have made perhaps the poorest showing, has an unusually good history faculty. It seems to be that these young boys, as a class, acquire very rapidly but do not assimilate—quick to learn and quick to forget.

"Of course it may be argued that a knowledge of Queen Elizabeth and Cromwell, Hamilton and Andrew Jackson and of the English classics is not essential to the trial of a case in our City courts. True, but if a boy is going to make a success of himself in the law and not merely be a putterer with petty cases, if he is going to successfully represent his client against well trained lawyers on the other side, he has got to have a disciplined mind, and a complete lack of knowledge of elementary educational subjects raises a strong inference that he has not had much mental discipline. It is not knowledge of any particular facts which is important, but the training of the mind which results from a study of those facts, and if a boy has never had much such training I do not believe he can make a success of himself in the law. . . .

"Even if an attempt be made to argue that general education is not essential to a lawyer it clearly is essential that a lawyer have a sense of his responsibility to his clients, of the proper handling of trust funds, of the meaning of an oath. There is a fair presumption, though not a conclusive presumption, that if a boy is without educational background he is also without moral background. Both are matters of family tradition and influence and of definite training. If he is without training along educational lines there is danger that he is without much training along other lines. Hence if we postpone a boy for complete ignorance of the elementary educational subjects it is partly because we think that a lawyer needs some general education and to some extent because the lack of education along mental lines raises some presumption of a lack of moral background as well. At least our experience has been that the boys with a college degree appear to possess, to a larger extent than those who have not had such education, the moral qualities necessary to make a responsible lawyer.

Girl Applicants Present Vexing Problem

"The girl applicants have presented a vexing problem. There are now a good many of them. There is no intrinsic reason that I know of why girls should not make competent lawyers, but those who have applied for admission this year have been with few exceptions of very inferior quality. Most of them have been stenographers from the small law offices who have taken night law courses with the idea that if they can be admitted they may be able to increase their salaries by doing part typewriting and part law. Most of them clearly can never become competent lawyers, but after they have worked for years to get a law degree, we hesitate to say to them that they give us a general impression of poor quality and that we will not pass them.

"Another class of applicants who present a problem are the many immigrant boys. Although most of them are so mentally quick as to easily pass any examinations, some can hardly speak English intelligibly and show little understanding of or feeling for American institutions and government and the history and background of such institutions. Should a young man be allowed to become a lawyer in our courts before he has become an assimilated American?

"It is often suggested that some method be adopted for sifting applicants before they are admitted to the Law Schools, for to reject them at that stage would not be so drastic and serious as to reject them three years later after they have completed, often at great sacrifices, their law school course. But how can such sifting be done? Pennsylvania requires character affidavits before an applicant be admitted to law study. This probably accomplishes little, for our experience is that anyone can secure such affidavits and that for the most part they mean very little. A character examination at the time of entering law school at say about 20, which is the average age, would probably result in virtually no rejections. Acts of misconduct which result in rejection usually occur at a later period. Rejection on the ground that the candidate seems generally unfitted to make a success of the law would be infrequent for the Examining Committee would doubtless feel that the boy might develop a lot in the next few years and that they had better give him the benefit of the doubt and let him try, thinking that the Character Committee who would examine him just before admission to practice could turn him down if he was then still unfit. A Character and Fitness examination prior to entering law school is theoretically desirable, but as a practical matter I do not believe it feasible. I am inclined to think that about all that can be done along this line is to try to get the law schools themselves to discourage the boys applying for admission who appear unfit to make a success of law.

"It is perfectly clear, in my opinion, that large numbers of boys are now getting into the profession who are not adequately educated and a good many who are not promising propositions from the standpoint of character. I am clear that the solution is the requirement of an A. B. degree. If that is too much to hope for as yet, then a requirement of two years towards an A. B. or B. S. degree would help a lot. No single examination to test general education, as a preliminary to the Bar Examinations, can accomplish as much. Dean Pound of the Harvard Law School has said:

"'When a student is required to have pursued at least two years of college work there is a guaranty that he has been subjected to entrance requirements and to a series of tests extending over a sufficient time so that he must have attained a certain educational standard. When attempt is made to substitute one general examination as a preliminary to taking the Bar Examinations the result is to put the matter in the hands of crammers. . . . My conviction is that the only way in which we shall be able to insure a reasonably educated profession is to require the preliminary sifting involved in completion of a High School course and some portion of a college course. This will insure that the candidate has been subjected to a series of tests as to his capacity for learning and has passed them successfully. A substitute in the way of one general examination by way of preliminary to taking the bar examinations would insure nothing more than that the candidate has employed a professional crammer.'

"The one argument advanced against the college requirement is that it would keep out the Abraham Lincolns. I doubt it because any boy who wants an education can get it nowadays as he could not in Lincoln's time. A boy with the ability and energy to become another Lincoln certainly would get the needed education. A boy who in this day of many colleges and free scholarships has not sufficient ambition to get an education would probably be no loss to the profession. During the past year our Committee specifically asked every non-college applicant who appeared before it whether if a college education had been a prerequisite for admission to the profession he could have managed to secure it. Only four boys out of the more than 800 examined replied that they did not think that they could have managed it and that it would have prevented their going into law. But even if the college requirement did bar a very few boys who, in spite of poor elementary education might develop into real lawyers, any such result would be offset a hundred times by the advantage of eliminating from the profession thousands of ignorant, illiterate applicants. The present situation is bad. The Character Committee does its best and its five members devote voluntarily more than 40 full days a year to the gratuitous service but they cannot, as the Rules now are, eliminate all the unfit and the one effective remedy is to put into effect a college requirement.

ALAN FOX.

January 10, 1927.

Girl Applicants Defended

Mr. Fox's allusion to the "vexing problem" presented by girl applicants in the above statement did not pass unchallenged. Miss Ruth Lewinson, representing the N. Y. Council of the National Women Lawyers' Association, replied to it as follows:

"And while I am on the subject of the system as it now exists, may I, in this court, comment on the remarks of a former distinguished member of the Character Committee of the First Department who called attention in the public press to the 'menace of the girl typist.' No such menace exists.

"In the last few years I have personally interviewed, placed and advised more than 100 women applicants for admission to the bar. Of those 30 per cent were college graduates. The reasons why the girl typists are no menace are: First, because the fewest of them go into independent practice so as to influence litigation or litigants; second, because any woman who, in spite of all handicaps and barriers, is earnest enough to study law and does study law, learns in her stenography job the forms, the routine, the rules of practice; and, third, because there is no finer training, in my opinion, for a future lawyer than the constant sitting in when legal documents are drawn, when testimony is taken, when wills are executed.

"The average male law clerk while serving his clerkship serves papers, files papers, answers calendars and occasionally looks up a point of law. The stenographer, and I speak now of one who has studied law, sits in when wills and contracts are drawn, frequently is called upon to witness a will, and she sits in when memoranda of law are woven together by an experienced attorney into a trial or an appeal brief or an opinion. For many years to come there will be no menace from that source."

By Way of Illustration

Chairman Agar, of the Committee on Character and Fitness of the First Judicial Department, attached the following transcript of an examination of an applicant by his committee to his letter transmitting the report to Chief Judge Cardozo of the Court of Appeals:

Q. Why didn't you go to college, Mr. ————? A. Well, when I graduated from High School I was almost 21, and thought I wanted to go right into law school.

Q. You wanted to make haste? A. Make haste; yes, sir.

Q. Do you do any reading outside of the law, in order to make up for the lack of a college education? A. No, sir.

Q. Nothing at all? A. No, sir.

Q. You have read American history, haven't you? A. In High School.

Q. Not since then? A. Not since then.

Q. Any English history? A. No, sir. Only during the school period, and a little bit we got in High School.

Q. Do you know what the Bill of Rights is? A. I think—no, sir; I can't just recall it now.

Q. And the Magna Charta? A. That was a document sent to the American colonies by England.

Q. What's that? A. A document sent by the English government here, before the Revolutionary War, and they tried—and the people here rejected it. I don't know what it contained.

Q. Wasn't it a document that was granted by one of the English Kings to the Barons? A. (No answer.)

Q. You don't remember? A. No, sir.

Q. Do you know what the Articles of Confederation were? A. They were the forerunners of the Constitution. They had the power to tax but they did not have any power—they had the power to levy taxes, but had no power to collect them. And then they had the Constitution. They didn't have teeth in it to put it into effect.

Q. And what document superseded the Articles of Confederation? A. The Constitution.

Q. Of the United States? A. Yes, sir.

Q. What was the difference in the policies between Jefferson and Hamilton, on the theory of Constitutional construction? A. Jefferson was for the democratic policy, a policy by the majority of the people; and Hamilton was, if I recall, was for a policy by the higher—what I mean by that, by the minority of the people, the rich people. Jefferson was for all the people.

Q. Do you know who Edmund Burke was? A. No.

Q. Lord Macauley? A. No, sir.

Q. Who was Andrew Jackson? A. He was a leader, a general in the Confederate Army. No. He was President of the Confederate States; succeeded——

Q. That was Jeff Davis, wasn't it? A. Yes, sir, Jackson was a Confederate General in the Confederate Army during the Civil War.

Q. That was Stonewall Jackson. A. Yes, sir.

Q. We are speaking of Andrew Jackson now. Wasn't he a President of the United States? A. Yes, he was.

Q. Did he fight in any great battle in which the United States was involved? A. War of 1812.

Q. That's right. What was the name of the battle? A. I don't recall.

Q. Do you know who Daniel Webster was? A. He was a United States Senator.

Q. From what state? A. I think he was from New York.

Q. No Massachusetts. Do you remember who John C. Calhoun was? A. He was a United States Senator from South Carolina.

Q. Do you know what great work on government was written by Hamilton, Madison and Jay? A. No, sir.

Q. Tell us all you know about James Madison? A. He was president of the United States.

Q. Did he have anything to do with the drawing up or adoption of the Constitution? A. Yes, sir. He was one of the first who helped Hamilton in drawing it up.

Q. Well, what part did he play in connection with it, if any. A. I think he helped Hamilton in writing it—the whole Constitution. He reviewed it after it was written.

Q. Where was the—rather, in what body was the Constitution drawn up. A. I don't just know what you mean by that.

Q. Well, can you tell us the story of the drawing up and the adoption of the Constitution? A. Well, they met in Philadelphia——

Q. Who met? A. Hamilton, Madison, Adams.

Q. Well, what body was this that met there? A. Representatives from each of the original thirteen states.

Q. What would you call this meeting? A. The Federal Constitution. No.

Q. What was the answer, did you say? A. The Federal Constitution meeting.

Q. You don't mean that the meeting that adopted the Constitution was called the Federal Constitution? A. No.

Q. Well, do you know how many states had to adopt the Constitution in order to have it become the Constitution? A. I believe it was two-thirds of the thirteen states.

Q. Passing on a little further—do you know who was President of the United States during the War of 1812? A. (No answer).

Q. Can you name any incident at all that took place during the War of 1812, any military action or any other incident of the war? A. The blowing up of the Maine—battleship Maine—at Manila.

Q. Do you know from what country the United States made the Louisiana Purchase? A. France.

Q. Under what President, American President was that done? A. I think it was under Monroe.

Q. Do you know what the territory was that the United States acquired? A. I think it was west of the Mississippi to the Rockies, and up north to about North Dakota now.

Q. Do you happen to remember about how much the United States paid for that territory? A. No, sir, I do not.

Q. Do you know whether any one of the American Presidents was ever impeached? A. I think Buchanan.

Q. Well, now, transferring the questioning just a little, can you name any one of the great English Prime Ministers who held office in the nineteenth century? A. I think of them, but I can't recall his name. It is on the tip of my tongue.

Q. Well, can you name any one of the great English Prime Ministers of the eighteenth century? A. No, sir.

Q. Do you happen to remember who any of the great English statesmen were about the time of the American Revolution? A. Pitt was a statesman, I recall.

Q. Well, tell us all you know about him. A. Well, he got up in the House of Commons and made a speech in favor of the colonies, saying that they should not be taxed without representation—they were part of the English government and should have representation in the House of Lords and Commons.

Q. Do you know what position in the English government Disraeli held? I think he was Archbishop.

Q. Well, now, can you tell me what the Hundred Years' War was—what nations it was between? A. That was—between France and England, I believe.

Q. Well, can you tell me any of the men that took part in that war, on either side, or the names of any of the battles of that war? A. No, sir, I could not.

Q. Do you know about when the jury system was set up—came into being? A. No, sir, I could not tell you.

Q. You don't happen to remember what the origin of the jury system is? A. No, sir.

Q. Do you know how many men sit on a Grand Jury? A. Twenty-four.

Q. Can you tell us what a writ of *habeas corpus* is? A. It is a writ to produce the body before the court.

Q. Do you know what the origin of that writ is? A. No, sir; I couldn't say.

American Bar Association's Position Stated

The memorandum submitted by President Whitman, of the American Bar Association, starts with the emphatic declaration that "The American Bar Association is of the opinion that every candidate for admission to the Bar should give evidence of graduation from a law school which requires as a condition of admission at least two years of study in a college." It reviews the action of the Association in regard to this important matter, beginning with the request, in 1913, that the Carnegie Foundation for the Advancement of Teaching, make a study of legal education, extending through the activities of the section on Legal Education and the Special Committee appointed by it, and concluding with the approval of the standards recommended by the section at the Cincinnati meeting of the American Bar Association and the subsequent confirmatory resolution passed at the special meeting of Bar Association Delegates held in Washington, D. C. in February, 1922. The standards adopted by the Association are also set out in full, and a copy of the full report of the Special Committee above referred to was submitted along with the memorandum.

CONSTITUTIONAL ASPECTS OF TAXATION

The Subject of Taxation—Four Tests Devised by Court to Determine Whether Tax Falls on Business or Property—Measure of Taxation—Views of U. S. Supreme Court Prior to 1908 as to Measurement of Valid Subject of Taxation by Property or Business Not Directly Taxable—Significance of Frick vs. Pennsylvania—Lines of Future Development

By Elcanon Isaacs
*Of the Cincinnati, Ohio, Bar**

In examining the constitutionality of a tax, perhaps the first step we must take is to find the subject on which the tax falls.[1] The subjects of taxation are said to be three and only three, namely, persons, business and property.[2] Those on persons usually take the form of capitation or poll taxes. Those on business are on activity and may be considered to be on or for the use of a privilege. Those on property are either imposed on tangibles, or on intangibles such as credits, franchises, good-will or going value.

Constitutional principles have at times, but not often, been considered for personal taxes. The principal question which arises in connection with them is one of jurisdiction. In the case of business and property taxes, on the other hand, it has often been necessary to invoke the commerce, due process and equal protection clauses of the Federal Constitution and, in time, business and property acquired a high degree of protection against state taxes.

The conditions under which this protection is applied, however, differ very greatly for the two. An illustration of the difference under the commerce clause is found in Wells Fargo & Co. v. Nevada,[3] where an assessor by mistake entered a property tax on the duplicate as one on business. The court said:[4]

> The difference is vital, for, consistently with the commerce clause of the Federal Constitution, the state could not tax the privilege or act of engaging in interstate commerce, but could tax the company's property within the state, although chiefly employed in such commerce.

A similar distinction must sometimes be made in the case of state constitutions. A provision in a state constitution requiring uniformity may invalidate a property, but apparently under similar circumstances not a business tax.[5]

1. The Subject of Taxation[6]

It becomes, therefore, of importance to determine whether a tax falls on business or property. The name which the legislature gives will not always help for this purpose.[7] In fact, it may arouse suspicions. Nor will the wording of a statute be determinative because not infrequently a tax ostensibly on business when examined turns out to be really on property. To make the differentiation, the courts have devised four tests, namely, (a) ownership, (b) use, (c) commutation, and (d) addition of taxes.

(a) *Ownership.* In Dawson v. Kentucky Distilleries Co.,[8] Kentucky levied an annual license tax

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1. This paper is based on the discussion in "Business and Property Taxes," 86 Yale Law Journal 195 (1926) and "The Subject and Measure of Taxation," 26 Columbia Law Review 929 (1926).

2. State Tax on Foreign-held Bonds. 15 Wall. 300, 319 (U. S. 1872).

3. 248 U. S. 165, 39 Sup. Ct. 62 (1918).

4. 248 U. S. at page 167.

5. Dawson v. Kentucky Distilleries Co., 255 U. S. 288, 41 Sup. Ct. 272 (1921).

6. "Business and Property Taxes," 26 Yale Law Journal 195 (1926).

7. Galveston, Harrisburg & San Antonio Ry. v. Texas, 210 U. S. 217, 227, 28 Sup. Ct. 638 (1908).

8. 255 U. S. 288, 41 Sup. Ct. 272 (1921).

on every person engaged in the business of manufacturing whisky or in the business of owning and storing it in bonded warehouses in the state at the rate of fifty cents a gallon for all whisky either withdrawn from bond or transferred in bond from Kentucky to points outside the state. The statute called the tax a license; the wording used indicated the subject was an occupation, but on examination, the court found none of the characteristics of an occupation tax. The incidence was not on the occupation of warehouseman, and the business of owning and storing whisky in bond was not made taxable. Nor was the tax imposed on owning, storing and removing whisky from bond or on the business of removing liquor owned. The thing really taxed was the act of the owner in taking his property out of storage into his own possession, and[9]

> to levy a tax by reason of ownership of property is to tax the property.

(b) *Use.* While just as important as the ownership of property, is the use by the owner, use, except possibly in cases where the sole purpose to which property can be put is taxed, is generally considered a privilege. A tax, therefore, on the use of a privilege is a tax not on property but on activity or business. In Oliver Iron Mining Co. v. Lord,[10] where an annual tax of six per cent of the value of ore mined during the preceding year was imposed on all who were engaged in the business of mining or producing ore, the Court said:[11]

> Obviously a tax laid on those who are engaged in that business, and laid on them solely because they are so engaged, . . . is an occupation tax.

It was contended in this case that the subject taxed was really property, but the Court said:[12]

> We think the tax in its essence is what the act calls it—an occupation tax. It is not laid on the land containing the ore, nor on the ore after removal, but on the business of mining the ore, which consists in severing it from its natural bed and bringing it to the surface where it can become an article of commerce and be utilized in the industrial arts.

Perhaps at this point should be noticed the difference between a tax (a) for the use of a privilege, (b) on the use of a privilege, and (c) on the privilege itself. The first is a license tax. The second is a tax on business or activity and is generally called an excise. The third, on the privilege itself is a tax on a valuable property right, on a commodity, as it has been called, and is a tax on property. The most general form of the third is a tax on the franchise to be a domestic corporation or to do business as a foreign corporation, a form of intangible property. The term "franchise," however, is frequently used to describe the excise or license distinguished above. In this paper, the term refers only to a tax on the property right.

The distinction between a tax on the privilege itself and on the use of the privilege has not always been easy to make. In Ozark Pipe Line Corporation v. Monier,[13] an annual "franchise" tax was imposed on a corporation equal to one-tenth of one per cent of the par value of capital stock and surplus employed in business in the state. The majority opinion emphasized the business element and held the tax was on interstate business. Mr. Justice Brandeis, dissenting, emphasized the element of privilege, saying, "It is laid upon the privilege of carrying on business in corporate form," and construed the tax as involving a tax on a franchise as property.

(c) *Commutation.* In cases where neither ownership nor use seem to indicate what the subject taxed is, there are often other elements which can be examined into. One of these is commutation. If a tax is in lieu of all others, it is generally considered to fall on property. There is no reason why a tax in lieu of all others should be considered to fall on one rather than on the other, but the courts have taken the view that property must be taxed first. In United States Express Co. v. Minnesota,[14] it is said:[15]

> The statute itself provides that the assessments under it "shall be in lieu of all taxes upon its property." In other words, this is the only mode prescribed in Minnesota for exercising the recognized authority of the state to tax the property of express companies as going concerns within its jurisdiction. If not taxed by this method, the property is not taxed at all.

(d) *Addition of taxes.* Conversely, as we should expect, a tax in addition to all others falls on business. In reference to the statute in Choctaw, Oklahoma & Gulf R. R. v. Harrison[16] which it was contended imposed a tax on property, the Court said:[17]

> Its very language imposes a "gross revenue tax which shall be in addition to the taxes levied and collected upon an *ad valorem* basis" . . . the manifest purpose is to reach all sales and secure a certain percentage thereof.

There are, however, three classes of property which can be taxed before an additional tax will always be held to fall on business. There is first, the physical property such as the tracks, rolling stock or depots of a railroad. There is secondly, the franchise to be a corporation or to do business which is often very valuable. That a tax must not amount to more than the ordinary tax on property is said in St. Louis Southwestern Ry v. Arkansas[18] not to

> mean, as is contended, that because of the Fourteenth Amendment, a state may not, in addition to the imposition of an ordinary property tax upon an instrumentality of interstate or international commerce, impose a franchise tax ascertained by reference to the property of the corporation within the state, including that employed in interstate commerce.

Finally, a property tax may be imposed on the corporate excess, the value over and above the value of the physical property and franchise, which arises from use of property as a unified concern. The principal problem which is presented in connection with the third type is to find its location. Is it located wherever the corporation does business or at the home office? And if it is not a value incidental to the tangible property as in the case of railroads, but becomes the predominant element of value, exceeding by far the physical assets, as in the case of an express company, is it still taxable as property? All these questions have already been considered.[19]

No doubt, additional property taxes of the three types could be added to those already levied unless there is a provision in a state constitution against double taxation. Such taxes could be added, pos-

9. 255 U. S. at page 294.
10. 262 U. S. 172, 43 Sup. Ct. 526 (1923).
11. 262 U. S. at page 177.
12. 262 U. S. at page 176.
13. 266 U. S. 555, 45 Sup. Ct. 184 (1925).
14. 223 U. S. 335, 32 Sup. Ct. 211 (1914).
15. 223 U. S. at page 346.
16. 235 U. S. 292, 35 Sup. Ct. 97 (1912).
17. 235 U. S. at page 298.
18. 235 U. S. 350, 367, 35 Sup. Ct. 99 (1914).
19. "The Unit Rule," 35 Yale Law Journal 838 (1926).

sibly, until the limit set up in Postal Telegraph Cable Co. v. Adams[20] is reached, namely, that the total should amount[21]

> to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto.

When the three forms of property are taxed up to the limit, however, an additional tax must fall on business and may be valid if the business is of a local nature.[22]

Of course, business may be taxed if a statute provides specifically therefor, even with one tax, but if tests are to be resorted to in order to determine where the incidence falls, a complete taxation of property forecloses an interpretation of a statute as applying to property. If it is considered, further, that the business affected is interstate commerce, the tax will be invalid.[23]

II. The Measure of Taxation[24]

After the subject on which a tax falls has been definitely determined but requires, nevertheless, further consideration because it is not ruled out as being interstate commerce or untouchable property, that is, property which cannot be taxed because it is protected by some constitutional provision, the next step is to find the measure of the tax. Under the view which formerly prevailed, it was not necessary to do this and the courts probably did not always recognize that every tax had a measure distinct from the subject. Where they did recognize the two elements, their purpose was usually to point out that an unlimited measure was not really taxed but was simply used as a means for determining the amount to be paid.

To illustrate the nature of the measure, which may be in the form of tangibles, capital stock, gross receipts, income, dividends, sales, and purchases, or possibly other things, as a standard of value, an example of a simple relation may be considered. A statute provides for a general *ad valorem* tax on all property, and also provides that the rate of taxation should be fixed by a body made up of local officials after total valuations and probable expenses for the ensuing year are computed. This is the general type of statute imposing an *ad valorem* tax. The officials after consideration, fix the rate at two per cent. As applied to an automobile valued at $1,000, this rate gives a tax of $20. In this operation it does not appear that there is a measure for the tax which is distinct from the subject. If we examine the matter, however, we find that the automobile itself is the subject taxed, that the valuation of $1,000 is the measure used and that it is the rate applied to the measure that gives the tax of $20. Likewise in the case of a local business, such as a store, there is also probably no need for distinguishing consciously the two characteristics because the measure, whatever its form, is closely allied with or may be in terms of the particular business.

Where, however, property in more than one state is owned by one taxpayer or where one taxpayer does a unified business in several states, the question arises whether the measure for a tax on the local property or store should be restricted as before to the subject taxed or even to elements located in the taxing jurisdiction, or whether it can be based on the total wealth of the taxpayer from all sources derived, that is, treated, to a certain extent, as a personal tax.[25] Stated in this way the answer seems self-evident that the measure should be restricted to the local subject. The Supreme Court of the United States prior to 1908, however, did not take this view. It felt that a valid subject of taxation could be measured by property or business which could not be taxed directly. The principle was that a measure whether for a tax falling on business or on property, could be based on capital stock, gross receipts, income, tangibles or intangibles not limited in any way to the taxing jurisdiction. The relation of the subject and measure in these cases, arose in four ways: (a) local property measured by untouchable property, (b) local property measured by interstate commerce, (c) local activity measured by interstate commerce, and (d) local activity measured by untouchable property.

(a) *Local property measured by untouchable property.* The principle that a tax on a valid subject could be measured by untouchable property, seems to have arisen first in the case of a state tax on a franchise to be a corporation which was measured by property invested in federal securities. It was, of course, established that a state could not tax federal securities directly, but the question was whether a state could levy a tax on a valid subject, the state franchise, and measure it by these securities. Since it was true, the tax was not on the securities themselves or on money invested in them, the Supreme Court took the view that this measurement was permissible. It said in Society for Savings v. Coite,[26] where deposits used as a measure were invested in federal securities:

> Reference is evidently made to the total amount of deposits on the day named, not as the subject-matter for assessment, but as the basis for computing the tax required to be paid by the corporation defendants.

This relation was also sustained in Home Insurance Co. v. New York.[27]

(b) *Local property measured by interstate commerce.* It was, also, very easy to extend the same principle to cases where a state franchise was taxed as property and the measure employed was interstate commerce. This relation seems to be the basis of Maine v. Grand Trunk Ry.,[28] where the Court called the tax an excise, but treated it as a tax on intangible property. It criticized the holding of the lower court that the tax was a regulation of commerce and said:[29]

> This ruling was founded upon the assumption that a reference by the statute to the transportation receipts and to a certain percentage of the same in determining the amount of the excise tax, was in effect the imposition of the tax upon such receipts, and therefore an interference with interstate and foreign commerce. But a resort to those receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide

20. 155 U. S. 688, 15 Sup. Ct. 268 (1895).
21. 155 U. S. at page 697.
22. Ohio Tax Cases, 232 U. S. 576, 34 Sup. Ct. 372 (1914).
23. Meyer v. Wells Fargo & Co., 223 U. S. 298, 32 Sup. Ct. 218 (1912).
24. "The Subject and Measure of Taxation," 26 Columbia Law Review 939 (1926). The availability of the various subjects under constitutional principles will be considered in "Corporate Taxes and the Federal Constitution" to be published in the Columbia Law Review, and in "Activity Subsequent to Interstate Commerce" to be published in the Michigan Law Review. Income taxes will also be considered separately.
25. Fidelity and Columbia Trust Co. v. Louisville, 245 U. S. 54, 38 Sup. Ct. 40 (1917). Cf. also Union Transit Refrigerator Co. v. Louisville, 199 U. S. 194, 26 Sup. Ct. 36 (1905) and Professor Beale's discussion of the question in "Jurisdiction to Tax," 22 Harvard Law Review 587, 592 (1919) and "Progress of the Law, 1923-1924: Taxation," 38 Harvard Law Review 280, 283 (1925).
26. 6 Wall. 594, 608 (1867).
27. 134 N. Y. 594, 10 Sup. Ct. 593 (1890).
28. 142 U. S. 217, 12 Sup. Ct. 121 (1891).
29. 142 U. S. at page 228.

> to a reasonable conclusion as to the amount of the excise tax which should be levied; and we are unable to perceive in that resort any interference with transportation, domestic or foreign, over the road of the railroad company, or any regulation of commerce which consists in such transportation.

The same relation has since been used frequently in the cases of taxes on franchises[30] and even for a subject of tangibles. In Pullman Co. v. Richardson,[31] where the latter is found, it is pointed out clearly:[32]

> In taxing property so situated and used a state may select and employ any appropriate means of reaching its actual or full value as part of a going concern,—such as treating the gross receipts from its use in both intrastate and interstate commerce as an index or measure of its value,—and if the means do not involve any discrimination against interstate commerce and the tax amounts to no more than what would be legitimate as an ordinary tax upon the property, valued with reference to its use, the tax is not open to attack as restraining or burdening such commerce.

(c) *Local activity measured by interstate commerce.* When, however, we come to apply the unlimited measure in the form of interstate commerce to a tax on local activity, we come to a relation where not only both elements of the tax are homogeneous, but where also a complication appears in that the measure, interstate commerce, has often been the subject of taxation itself and as such has been given a high degree of constitutional protection. It is true the legality of the relation is recognized in Hump Hairpin Mfg. Co. v. Emmerson,[33] where it is said:[34]

> While a state may not use its taxing power to regulate or burden interstate commerce, . . . on the other hand, it is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating federal constitutional rights. As coming within this latter description, taxes have been so repeatedly sustained where the proceeds of interstate commerce have been used as one of the elements in the process of determining the amount of a fund (not wholly derived from such commerce) to be assessed, that the principle of the cases so holding must be regarded as a settled exception to the general rule.

The legislatures, however, which rarely distinguished the subject from the measure, were diffident about using the relation because of its invalid appearance. Whenever they did enact a statute measuring activity by activity, they provided for a localization of the elements composing the measure to the state.[35]

In fact, in the one outstanding case where the experiment of a measure based on interstate commerce for a tax on local activity was tried, namely, Galveston, Harrisburg and San Antonio Ry. v. Texas,[36] the Supreme Court considered the unlimited measure of interstate commerce for local activity and rejected it. The tax in this case was really on local business. The statute indicated this was the subject taxed and four dissenting judges took the same view. The measure, however, was interstate commerce. Now, as Mr. Justice Holmes had pointed out, there is not much difference between a tax on a valid subject measured by a percentage of interstate business and a tax on a percentage of interstate business itself. The Court was never really faced with the problem in this obvious way in the other relations considered. In the *Galveston* case, however, the point was forcibly brought out that the use of an unlimited measure enabled the states to do indirectly what they could not do directly, and that all the protection thrown about interstate commerce by the Court would accomplish very little, if an unlimited measure for local business could be used.

The problem was how to get around the firmly established historical principle that a tax on a valid subject could always be measured by elements themselves not taxable. This principle could not be easily abrogated and still less could it be ignored. The answer which the Court gave was to adopt the doubtful expedient of holding that the tax imposed by the legislature in the *Galveston* case was really not on the subject it purported to be on, namely, local business, but was in fact, on the element we recognized as the measure, interstate commerce. The Court said:[37]

> The distinction between a tax "equal to" one per cent of gross receipts and a tax of one per cent of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute taken by itself. On the contrary, we rather infer from the judgment of the state court and from the argument on behalf of the state that another tax on the property of the railroad is upon a valuation of that property taken as a going concern. This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words "equal to."

This solution of the problem, however, was obviously unworkable. It ignored the difference between the subject and the measure and misconstrued the function of the measure. It could hardly be applied again. Still a proper answer was very important. In fact, the question presented one of the most difficult constitutional problems of the last fifteen years. The next time a case involving the relation arose, therefore, the Court adopted another device. In Western Union Telegraph Co. v. Kansas[38] and Pullman Co. v. Kansas[39] it recognized and admitted that the tax was on local activity where it fell, but held that when an unlimited measure was used which, in these cases, was capital stock representing property owned outside the state and interstate business, that the tax was shifted, as it were, to the unlimited measure and by virtue of this shifting became invalid. In the Pullman case it is said:[40]

> . . . That the requirement that the company, as a condition of its right to do intrastate business in Kansas, should, in the form of a fee, pay to the state a specified per cent of its authorized capital, was a violation of the Constitution of the United States, in that such a single fee, based as it was on all the property, interests and business of the company, within and out of the state, was, in effect, a tax both on the interstate business of that company, and on its property outside of Kansas. . .

(d) *Local activity measured by untouchable property.* But manifestly this solution of the problem was just as unsatisfactory as the one adopted in the *Galveston* case although, it is true, it did not

30. U. S. Express Co. v. Minnesota, 223 U. S. 335, 33 Sup. Ct. 211 (1912).
31. Pullman Co. v. Richardson, 261 U. S. 330, 43 Sup. Ct. 366 (1923).
32. 261 U. S. at page 338.
33. 258 U. S. 290, 42 Sup. Ct. 305 (1922).
34. 258 U. S. at page 294.
35. Western Union Telegraph Co. v. Alabama State Board of Assessment, 132 U. S. 472, 10 Sup. Ct. 161 (1889); Pacific Express Co. v. Seibert, 142 U. S. 339, 12 Sup. Ct. 250 (1892); Ohio Tax Cases, 232 U. S. 576, 34 Sup. Ct. 372 (1914); Cornell Steamboat Co. v. Sohmer, 235 U. S. 549, 35 Sup. Ct. 168 (1915). Cf. "The Unit Rule," 35 Yale Law Jour. 838 (1926).
36. 210 U. S. 217, 28 Sup. Ct. 638 (1908).
37. 210 U. S. at page 227.
38. 216 U. S. 1, 30 Sup. Ct. 190 (1910).
39. 216 U. S. 56, 30 Sup. Ct. 232 (1910).
40. 216 U. S. at page 69. The other grounds of decision of the *Western Union* and *Pullman* cases are found in "The Federal Protection of Foreign Corporations," 26 Columbia Law Review 263 (1926).

do quite as much violence to the statute. Its principal defect lay in the fact that it failed to dispose of the difficulty presented by the valid use of the unlimited measure. In fact, not only was the rule of the unlimited measure not affected by the *Western Union* case, it received its clearest enunciation two years later in Flint v. Stone Tracy Co.,[41] a case in which a federal business tax was measured by property invested in non-taxable securities and property not used in the business taxed. In this case the court said:[42]

> It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is non-taxable.

The matter stood in this confused state for some time, the Court repeatedly saying that each case must be decided on its own facts and that no general principles could be applied to all the cases. In 1925, however, a new point of attack was presented in the case of inheritance taxes—taxes which are in effect on an act. In Frick v. Pennsylvania,[43] an inheritance tax was levied by Pennsylvania on the transfer of property of a decedent who had been domiciled in the state. Besides real and personal property in Pennsylvania, the estate included tangible personalty in Massachusetts and New York. It had been generally held in the case of inheritance taxes, that the state of the domicil could levy a tax because a universal succession was considered to take place there. In addition, it had been held that the state where the situs was could levy an inheritance tax because of its jurisdiction over the property. When, therefore, Pennsylvania levied an inheritance tax measured by all the property of the decedent, the Court first had to decide the question whether Pennsylvania could levy a tax because of the domicil of the decedent, and measure it by property not located in the state. It answered the question by rejecting this basis for an inheritance tax except in the case of intangibles. The other basis, namely, the situs of some of the property in Pennsylvania, it also considered, and limited the measure for a tax on the transfer of this property to the property located in the taxing state itself. To permit the inclusion of untouchable elements in the measure, it said, would be[44]

> but the equivalent of saying it was admissible to measure the tax by a standard which took no account of the distinction between what the state had power to tax and what it had no power to tax and which necessarily operated to make the amount of the tax just what it would have been had the state's power included what was excluded by the Constitution. This ground, in our opinion, is not tenable. It would open the way for easily doing indirectly what is forbidden to be done directly, and would render important constitutional limitations of no avail.

In the *Frick* case, therefore, it seems to be held that the tax on a valid subject cannot be measured by elements themselves untouchable.

We can see from the foregoing examination that the status of the law on the use of an unlimited measure for a tax is uncertain. If we make a list of holdings in some of the cases that are still cited as authority, we find that a tax on local activity may be measured by untouchable property (the *Horn Silver Mining* case), that it may not be measured by untouchable property and interstate commerce (the *Western Union* and *Pullman* cases), that it may be measured by untouchable property (the *Flint* case), that it may not be measured by untouchable property consisting of tangibles (the *Frick* case). Or, considering the valid subject of local property we find that this may be measured not only by interstate commerce (the *Richardson* case), but also by untouchable property (the *Home Insurance* case).

Of course, the nature of the confusion which it has always been felt existed, could not become patent until we reduced the statutes to a common denominator on the basis of the subjects taxed, and the cases to their lowest terms on the basis of the subject and measure used. It was, no doubt, a failure on the part of the courts to analyze the underlying elements that were common to all the cases that caused the difficulty we are now experiencing.

As to the future, the development which will take place seems fairly clear. It will be along the lines of the *Frick* case, with a restriction of the elements constituting the measure to the taxing jurisdiction. But the method by which this will be accomplished is not so clear. It is too much to ask of the Court to adopt outright the principle that a tax on a valid subject cannot be measured by elements which themselves are not taxable. This solution would be desirable, perhaps, but it is doubtful if the Court would adopt it. Rather the method which will be followed will be to apply the new principle to concrete cases as they arise by way of exception to the general rule. In time, this procedure will move the line of the decisions completely into new territory. Until this is done, however, it is evident that the confusion that characterizes the subject at present, will continue.

41. 220 U. S. 107, 31 Sup. Ct. 342 (1911); Horn Silver Mining Co. v. New York, 143 U. S. 305, 12 Sup. Ct. 403 (1892).
42. 220 U. S. at page 165.
43. 268 U. S. 473, 45 Sup. Ct. 603 (1925).
44. 268 U. S. at page 494.

COOPERATION OF PRESS AND BAR TO DATE

Need of Improvement in Journalistic Dealing with Matter Touching Courts—Spread of Interest in Subject and Discussion in Bar Associations and Other Quarters—Illinois Judges Adopt Rule as to Photographs—Judge Dunne's Assertion of Judicial Power Upheld—Responsible Journalism Sounds Encouraging Note—English Statute on Publication of Court Proceedings—Suggestions

By Andrew R. Sherriff
Member of the Chicago Bar

IT IS now more than a decade since the present generation of lawyers became acutely aware of the fact that the newspaper men had apparently forgotten all they ever knew about the necessary formalities to be observed in publishing their matter touching the courts. In private the members of that learned profession were sorely disposed to fret and chafe about the daily assaults on their sense of propriety, but the first overt act on their part was probably the setting up by the Chicago Bar Association of its "Committee on Relations of the Press to Judicial Proceedings."

It can easily be imagined that this novice of a committee was at a loss to decide on means and methods, and so it continued year after year without accomplishing anything more than a series of tentative reports which, being necessarily candid, could never muster a majority willing to sign them; while the evils aimed at were becoming more and more frequent and degrading to the judiciary.

But the long road at last reached a turn, for meanwhile a strong and enterprising newspaper concern in Chicago established a "school of journalism," and in a course of public lectures it listed one to be given by a member of this committee who had shown persistent loyalty to its purposes. The discarded reports now became useful, for they contained a mass of clippings which, when compiled into a lecture, made abundant evidence of journalistic offenses, and a shocking exhibition. But the big newspaper and its fellows in the town were broad-minded; they saw the point, and made the exposure of their sins a subject of lively published comment. At last the lid was off.

That was three years ago. Other committees and discussions sprang up in other bar associations; lectures in other schools of journalism, and various published articles on newspaper abuses of the courts, became frequent throughout the country. The Association of the Bar of the City of New York staged a public joint discussion participated in by leading lawyers and editors. But differences of opinion were rife, and apparently irreconcilable: the judicial and ethical views of the bar seemed totally incompatible with the freedom of the press openly avowed, and the commercial values quietly conserved, on the part of the fourth estate.

However, the sentiments were organizing and a first concrete result was soon forthcoming. It was generally considered that the practice of photographing persons and scenes in court, and the prevailing manner of publishing them in the newspapers, constituted one of the most offensive and harmful of the practices to be abated. The judges of the state courts in Chicago were evidently of this belief, for the combined full benches comprising about forty-five judges, adopted this general rule:

> "No photographs shall be taken in any court room over which this court has jurisdiction or control, nor so close to such court room as to disturb the order and decorum thereof, while the court is in session or at any other time when court officials, parties, counsel, jurymen, witnesses or others connected with proceedings pending therein are present."

The advantages of such a standing rule on this troublesome subject, backed by the entire bench, are obvious; particularly in establishing a general regulation, and in protecting each individual judge with the combined authority of the constituent bench against the personal importunities of the press photographers. The evil of newspaper photographs has to a great extent been abated in Chicago as a result of this rule of court and the principle which it represents; it could of course be eliminated entirely by the loyal adherence of all the judges to the rule. But among so many there may naturally be a few who do not grasp its full significance.

In the course of this recent agitation the Conference of Bar Association Delegates has organized its "Committee on Co-operation between the Press and the Bar" whose purpose is well stated in the title; its members now are Andrew R. Sherriff, chairman, Chicago; Charles A. Boston, of New York; Andrew A. Bruce, of Chicago; Wendell H. Cloud, Kansas City, Mo.; Julius Henry Cohen, New York; Thomas H. Franklin, San Antonio, Tex.; Arthur W. Cupler, Fargo, N. D.; Vernon R. Loucks, Chicago; R. Allan Stephens, Springfield, Ill. This committee has had palpable occasions for action, and excellent material to use.

The last few months have been prolific of sordid and sensational cases in the courts, especially in the eastern centers. Several criminal and divorce cases have supplied copious matter susceptible of vast and lurid expansion at the hands of certain classes of newspaper experts. Competition among them and the publishers of their sheets to breach all previous limitations of indecency (and exceed all circulation statistics) carried many of them to unprecedented and appalling extremes. Certain judges seemed impotent or insensate. The courts as sewers of human filth were being widely advertised.

In the midst of the tumult a different voice was heard. It came from Judge Eugene O'Dunne sit-

ting on the criminal bench in Baltimore. Judge O'Dunne evidently had profound knowledge of the status of the judiciary as a primary organ of government, also a sound understanding of judicial responsibility, and he had enlightened and effective ways of expressing his concepts. His wholesome pronouncements as a judge, in dealing with matters involving regulation of the press, attracted the attention of the committee. Its recent activities in utilizing the materials created by Judge O'Dunne, and in holding forth his works as a good example, can be described by quoting from a circular letter widely distributed by the committee in January. It follows.

To INTERESTED PARTIES:

The purpose of the Committee on Co-operation of the Press and Bar . . . is to bring about a clearly established understanding on the subject of newspaper publicity in relation to judicial proceedings, and how it may be adapted in order to avoid harmful and unlawful interference with the functions of the judiciary.

This is a matter which is regarded as involving serious abuses, and is being widely discussed, but with little progress yet toward a general understanding.

In a recent case in Baltimore the Chief of the Detective Department of the City, Capt. Charles H. Burns, was convicted of contempt of court by Judge Eugene O'Dunne of the Criminal Court for giving an interview for publication on the evidence pertaining to a pending criminal case, and in passing on the matter the Judge explained his reasons at length. While the report (dated January 4th, 1927) enclosed herewith, was hurridly transcribed and printed. . . . yet it seems to be in substance so well conceived, and informative to those who are interested in the subject, that the Committee is distributing it to a number of police officials, prosecutors, judges, newspaper men and law journals throughout the country, to whom we think it may carry suggestions tending to bring about the better co-operation desired.

Previously Judge O'Dunne, who has made a profound study of these questions, had sentenced a number of newspaper men on charges of contempt for making photographs and publishing them during the course of a trial in his court, in violation of his orders, and a copy of his opinion in that case also (Maryland vs. Elliston and others, dated June 1st, 1926) is enclosed. This case is now pending on review in the Court of Appeals of Maryland where a decision should be announced shortly.

We trust this communication may be received in good part, and may help to develop better knowledge and practices in these important relationships. Please advise the chairman if you wish any more copies.

(Signed by all the members of the Committee.)

This letter with the enclosures was sent to the mayors, chiefs of police, State prosecutors, United States attorneys, chief justices of trial courts, managing editors of newspapers, and presidents of bar associations in the forty largest cities, also to editors of law journals and numerous other influential organs throughout the country. That these communications made a distinct impression is indicated by the many replies and requests for more copies received by the chairman.

The enclosed opinions were made up in pamphlet form. With exact understanding, candor, breadth of mind, and impersonally, they discussed at length the various features of the offenses committed and the law involved. They drew an accurate boundary line between the province of the courts and the province of the newspapers, with due definition of encroachments by each upon the other. They carried no threat, or suggestion of overweening power; with evident good nature, yet an unmistakable determination to sustain the dignity and shield the functions of the courts from outside embarrassments, these addresses conveyed crystalline lessons in knowledge of government and good citizenship to these extraordinary culprits, and in the case of the newspaper men, the further emphasis of a jail sentence for each of them, and a $5,000 fine in addition for the managing editor. That proceeding has since been approved in its entirety by the Maryland Court of Appeals, with an opinion, entitled Ex parte Sturm and others, filed January 21st, 1927, which all lawyers and perhaps many editors would delight to read; it is due to appear in the Atlantic Reporter.

But the ultimate achievement of Judge O'Dunne throughout these drastic experiments was to develop a spirit of mutual understanding and co-operation between the newspaper men and the courts of Baltimore. It is best disclosed by his own words. In commenting on the case recently, when the fine was paid and the sentences served, Judge O'Dunne is thus quoted in the Baltimore News:

"These contempt cases (for taking and publishing photographs) were thrust upon me in a sudden emergency arising out of the trial of the Whittemore (murder) case. It required prompt and decisive action. Very able lawyers had grave doubts both as to the legality of the action and as to the right of appeal.

"The Baltimore News and Baltimore American were honest in their desire to test both of these legal questions. They were given a full hearing and accorded every opportunity to do so. They have done so. In so doing they have also performed a service to the profession—to their profession and to ours.

"They have approached the question from a purely legal standpoint. Throughout, they evinced perfect candor. In their own papers they carried more accounts of the case than other papers did. At no time have they evidenced any personal animosity. It has been a legal controversy, not a personal issue.

"It is the people's institutions I was interested in, not any personal dignity of my own with which I was concerned. An an individual I would like to have been able to relieve the editors of the day's jail sentence—if that were compatible with the proper protection of the dignity of the people's tribunals. But it was not—nor have they asked or desired that. They have shown that editors are good sports —that they recognize the flag and salute it when the court of last resort has spoken. . . .

"The press and the courts are working in perfect harmony in this community. I hope that condition may continue."

Considering the effective methods of dealing with the agencies of court publicity as pursued from the bench in Baltimore, one reflects as to how far the newspaper men alone are responsible for these harmful practices, and to what extent the responsibility may rest on others not connected with the press. The newspapers are indeed the instrumentalities by which such matter is written up and conveyed to the public. But reflection leads to a broader view. The presiding judge has the power of almost complete control of the output, if he is aware of his power and wishes to exercise it. Police officers, detectives, prosecutors and defending attorneys have the privilege of silence, which would stop the flow through them. But the appetite for personal publicity exists in all sorts of places. In some, particularly in and about court proceedings, it should be curbed in respect for the greater public interests at stake.

Journalists of course have the right to use, truthfully and in the form of facts, all that they legitimately see or hear. There are indications that the great majority of them are disposed to co-operate for the maintenance of the institutional dignity and authority of the judiciary. But one of the most influential recently said in all seriousness, regarding the situation, "So long as a few of the

judges, police officers and lawyers persist in making clowns of themselves in seeking publicity, our wish to co-operate with the aims of the committee would be of little effect."

Likewise the activities of the lower grades of newspapers, those depending on the exploitation of human vices, crimes and outrages for their vendibility, are slow to yield to considerations of the public interests involved in the suggestion of curbing such evil proclivities. And so it appears to be the weak, the irresponsible and self-seeking minorities on both sides of the situation, that throw it out of balance and retard the necessary remedies.

In comparison the editorials called forth by the committee's action in some of the papers more representative of responsible journalism sound a distinctly approving and encouraging note. The *New York Times,* for example, says:

"These are at least hopeful beginnings of a better understanding of a subject long too much neglected in this country. We know how stringent are English judicial rulings in such matters. . . . If a change for the better can begin with prosecutors, and if clear and proper rules about publicity can be laid down by the courts, there can be no doubt that reputable newspapers will make every reasonable endeavor to comply with them."

And later referring to the opinion of the Maryland Court of Appeals, the same journal says:

"With this conclusion we are confident that self-respecting newspaper men, who cherish the honor and good repute of their calling, will agree."

In England the authorities, harassed by the newspapers in the ways here mentioned and presumably supported by public opinion, have not waited for voluntary co-operation of the journalists, but have gone more directly to the root of the matter. On last December 15th King George approved the recent Act of Parliament, providing in part as here quoted:

(1) It shall not be lawful to print or publish, or cause or procure to be printed or published,

(a) in relation to any judicial proceedings any indecent matter or indecent medical, surgical or physiological details being matter or details the publication of which would be calculated to injure public morals;

(b) in relation to any judicial proceedings for dissolution of marriage, for nullity of marriage, or for judicial separation, or for restitution of conjugal rights, any particulars other than the following, that is to say:

(i) the names, addresses and occupations of the parties and witnesses;

(ii) a concise statement of the charges, defences and countercharges in support of which evidence has been given;

(iii) submission on any point of law arising in the course of the proceedings, and the decision of the court thereon;

(iv) the summing-up of the judge and the finding of the jury (if any) and the judgment of the court and observations made by the judge in giving judgment:

Provided that nothing in this part of this subsection shall be held to permit the publication of anything contrary to the provisions of paragraph (a) of this subsection.

(And providing also for imprisonment, fine, and limitation to "proprietor, editor, master printer or publisher.")

Prohibitive legislation might do well for England, where the people are reported to have stronger traditions of law observance and better facilities for law enforcement. But in the light of recent history such measures for any new needs in America would not be readily recommended. On the other hand, the general tendency toward organization of interests and the solution of conflicts by adjustment and co-operation, clearly noticeable in this country to students of events, is far more available in the present instance, and more compatible with our concepts of democratic processes.

It should be through clarification, through constant assertion and exercise of the principles involved in the relations between the newspapers and the courts—not by harsh coercion—that the desired ends should be attained in this country. And this will be accomplished much better and more effectively by those actually participating in these relations, connected with the courts on one side and the newspapers on the other, than by volunteer preaching from the side lines by idealist members of the bar. It is entirely clear where the responsibility rests, and there it can be effectively performed.

By way of indicating further steps in advance, which are well taken if accomplished one by one, let it be mentioned that the rule on photographing above quoted has been fully vindicated and also greatly developed by the ruling in the Maryland Court of Appeals. So in the adoption of this policy by other courts a much better and more complete form, as determined in a recent revision of court rules, would be as follows:

Rule—. No photographs shall be taken in any court room over which this court has jurisdiction or control, nor so close thereto as to interfere with the proceedings or decorum thereof, while the court is in session, or at any other time when court officials, parties, counsel, jurymen, witnesses or others connected with proceedings pending therein are present, nor shall any photographic views taken or purporting to have been taken under such circumstances be published; and any violation or seeming violation of this rule shall be promptly brought to the attention of the court by any court official or attorney cognizant of the same, and heard upon a suggestion or charge of contempt.

And then to cure another frequent malfeasance, attention should be drawn to the widespread habit of the daily press in publishing stories purporting to tell about the actions and status of juries during their deliberations. There is no element in the law pertaining to juries more fundamental or necessary than the principle that the process of their deliberations is absolutely secret, and must be so for many reasons. Yet the numerous instances where this principle is violated by the newspapers and ignored by the judges are deplorable. Without further dissertation on the subject, which should be familiar to any lawyer worthy of a place on the bench, this further section from the recent revision above mentioned is set forth as an adequate form of rule which, if duly enforced, should soon abate this destructive invasion of the court's domain by the self-confessed prowlers and eavesdroppers of the press:

Rule —. The isolation and privacy of juries and jurymen in course of the performance of their duties shall be preserved inviolate; and any breach or seeming breach of this rule shall be promptly brought to the attention of the court by any court official or attorney cognizant of the same, and heard upon a suggestion or charge of contempt.

With these suggestions it may further be stated that the committee has in view the preparation of a full report, with an appendix in the nature of a simple statement or codification of principles such as the *Times* describes as "clear and proper rules . . . laid down by the court," to be derived from standard decisions and other authoritative sources. It may be that such a report and appendix would be welcome and useful as a handbook.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

A History of English Law. By W. S. Holdsworth, K. C., D. C. L., Vinerian Professor of English Law in the University of Oxford, Fellow of All Souls College, Oxford. Vol. 9. 1926. London: Methuen and Company; Boston: Little, Brown, and Company. Pp. xxxii, 457. Professor Holdsworth will soon be in the United States, for his first visit. It is understood that preparation for his American lectures has occupied him during the past year, since he finally committed to the printer the ninth and concluding volume of his History.

For in spite of an encouraging hint or two, we need expect no further volumes for several years to come. Professor Holdsworth has already given an ordinary life-time to his chosen task, and has rounded out the History as he planned it,—that is, complete to 1700, with many branches brought down to date. The publication of the work began over twenty-five years ago, with a modest single volume; in 1909 two more volumes appeared; but in 1921 these three volumes were rewritten, as part of the present series of nine volumes, which was completed only a few months ago.

§

Since 1922 the author has been professor of English law at Oxford, on the Vinerian foundation. This professorship has been held by many illustrious men; Dicey is a name that will occur to all; but the first and the last of the Vinerian professors may principally engage our attention. The founder, Charles Viner, was a member of one of the Inns of Court, but he was never called to the bar. He spent a long life (being of independent means) on the project of improving English law. His plan was for a better Abridgment than any of the current ones. For a considerable time he collected material without publishing. However, on the appearance of D'Anvers' volume E ("Error,") Viner commenced to publish, beginning with the letter F and proceeding to the end of the alphabet, in ten volumes, then re-commencing with A and finishing in thirteen more volumes. But while Viner's Abridgment was a good piece of work, well worth the compiler's fifty toilsome years on it, he had another and, as it proved, greater scheme in mind which ironically ended the usefulness of the Abridgment, but not until the Abridgment had served to endow the new plan.

§

This new project was the then bold one of having English law taught in English universities. It was long thought that Viner took this idea from a private course of lectures given at Oxford in 1753 by one William Blackstone, as Viner's will establishing the foundation was made in 1756; but more recently we have learned of an earlier will, on the same general lines, preceding Blackstone's course by a year or two. The fruitful suggestion of those lectures, from which sprang the Commentaries and much else of importance in law, came from the solicitor general, who three years afterwards became chief justice of England and is known to fame as Lord Mansfield. Viner died in 1758; he left practically everything he had, including the copyright and stock-on-hand of the Abridgment, for the founding of a professorship of English law at Oxford, together with a possible fellowship and some scholarships. James Bryce was one Vinerian scholar, in 1861; another was Taswell-Langmead, the constitutional historian. Our chief interest, however, is in the Vinerian professor. Blackstone was the illustrious first occupant of the chair. He was already a fellow of All Souls College, the famous place of learning founded by Henry V's prime minister, pupil of Oxford's tutelary genius William of Wykeham himself. The names of Christopher Wren and Jeremy Taylor are on the list of fellows of this college, and the Vinerian professorship seems to run with the reversion, for Dicey was and Professor Holdsworth is a fellow of All Souls.

§

Blackstone's first lectures, which afterwards appeared as the Commentaries, were delivered in 1758 and 9, and were an immediate and sensational success. The interest and renewed study which they aroused had many results—among others the superseding of the current type of Abridgments, including Viner's. The foundation was recast in 1867 and 1877, and while no doubt Professor Holdsworth still delivers "one solemn public lecture on the laws of England, and in the English language, in every academical term" (the adjective 'solemn' having many shades of meaning), we may safely assume that he does *not* "yearly read . . . sixty lectures at the least," nor forfeit forty shillings for each one omitted, as the university statute originally provided, with the burden of proof expressly laid on the professor.

§

There may be an honorable rivalry between England and America in this matter. For we too once had an Abridgment, and an author who gave fifty years to the task; whose great concern was to advance the cause of legal education; and who to that end founded a university professorship of law. A glorious story it is, now nearly forgotten, as such things go.

> "This man," it was said thirty-five years ago, "was in some sense the Father of American Jurisprudence. . . . In his youth he had drafted the most famous statute in American history; in his later years he prepared the first great compend of American law; and the crowning act of his last days was the endowment of a Harvard professor-

ship from which have proceeded most of the leading treatises in American jurisprudence. Judge Story has said that the doing of these things was 'glory enough for one man in one age;' John Quincy Adams declared that Liberty and Law were 'associated till the judgment day with the name of Nathan Dane;' and it was one of Webster's periods that the authorship of the great Northwestern Ordinance would make that name 'as immortal as if it were written on yonder firmament, blazing forever between Orion and the Pleiades.'"

§

Dane's life covered almost exactly the years of John Marshall, for they both died in 1835, and Dane was the elder by only three years. Dane was a Harvard man, and he was one of the delegates from Massachusetts to the Continental Congress, from which one day he slipped away to pay a visit to a fellow-scholar, the venerable Franklin. He was entrusted with the drafting of the ordinance for the government of the great territory northwest of the Ohio river, out of which the future was to see carved five noble States—Ohio, Indiana, Illinois, Michigan, Wisconsin. The draft he brought in was adopted with the change of only a few words, and became law as the Ordinance of 1787. Among other things, it anticipated the clause of the future federal Constitution prohibiting the States from passing any law impairing the obligation of a contract; and, following Jefferson, it excluded slavery from the Northwest Territory forever. We cannot too often recur to the text of this Ordinance:

"It is hereby ordained and declared, by the authority aforesaid [that is, 'the United States, in Congress assembled'], that the following articles shall be considered as articles of compact, between the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent, to wit:

"Article I. No person demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode of worship or religious sentiments in the said territory.

"Article II. The inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the Legislature, and of judicial proceedings according to the course of the common law. . . . And, in the just preservation of rights and property, it is understood and declared that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements *bona fide* and without fraud previously formed.

"Article III. Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

"Article IV. . . . The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the Confederacy, without any tax, impost, or duty therefor. . . .

"Article VI. There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted. . . ."

§

It cannot be said that the Ordinance was brought forth by Dane as Minerva from the head of Jupiter; there had been earlier reports and drafts, in which Jefferson's hand may be clearly discerned; but there is "glory enough" for all.

One other point in Dane's public life may be noted. He was a member of the (at least potentially separatist) Hartford Convention of 1814, about which we are only beginning to be fully informed, but his voice there is thought to have been on the side of the established order of things.

§

Of Dane's Abridgment, the first in America, Hicks says:

"The work, while wide in scope, is devoted chiefly to Federal law and the law of Massachusetts. . . . It is neither an abridgment, nor a digest, nor a treatise, strictly speaking, but combines within itself some features of all three."

§

Dane's third great contribution was a professorship of law at Harvard. What this meant to American legal education may be learned from Alfred Z. Reed's most interesting and valuable account of *Training for the Public Profession of the Law*, published by the Carnegie Foundation in 1921:

"The single event that turned the current of legal education in Harvard, New England, and the nation at large was the generosity of Nathan Dane. Author of an Abridgment of American Law designed on the general plan of Viner's English Abridgment, he conceived the idea of doing for Harvard what the Vinerian Professorship, made illustrious by Blackstone, had done for Oxford. [In 1829] he offered to the incoming president, Josiah Quincy, $10,000 (increased to $15,000 after the success of the school was assured) to establish a professorship bearing his name. One of the conditions of the gift was that the first incumbent should be the distinguished Judge Story. This was made the occasion for a complete reorganization of the school. . . . It is important to note Dane's original and primary purpose. This was the development not so much of lawyers as of law. With the work of Blackstone and Kent in his mind, he expressly stipulated that Story should be allowed time to publish as well as to teach. And he made another proviso, suggested both by the character of his personal labors and by his opposition, as an old school Federalist, to the doctrine of states' rights then being agitated by Calhoun. Story was to confine himself to law 'equally in force in all branches of our Federal Republic,' supplemented, if deemed advisable, by 'state law useful in more states than one, law clearly distinguished from that state law which is in force, and of use, in a single state only.' This is the origin of the Harvard tradition of scholarly publication as one of the main objects of its school, and of the 'national law' as opposed to the 'law of the jurisdiction' as the main object of its study."

§

For the results of Dane's far-sighted benefaction we may point proudly to Story and his twelve treatises, to *Greenleaf on Evidence*, to the writings of Parsons,—the "best sellers" of their day,—to Langdell, to the peerless Ames, to Dean Thayer, and to *Williston on Contracts*. All of these men have borne the title of Dane Professor of Law; and by their fruits we may know them.

§

Dane was honored in his lifetime. For a law-book review *de luxe* the reader may turn back a hundred years to the *North American Review*, "considered the organ of the *literati* of Harvard." The forty-page leading article for July, 1826,—anonymous, in accordance with then-accepted etiquette,—was an account of Dane's Abridgment; everybody knew that only John Marshall's colleague, the brilliant Judge Story, could have written it. Imagine an article of that scope in the place of honor in the *Atlantic Monthly* or the *Yale Review* for July, 1926! After Dane's gift to Harvard in 1829, the law school (then only

twelve years old) for a time bore his name, as did the first building erected for its use. Dane was childless, as was Viner. There is a good account of his life in 3 Green Bag, 548 (1891), and the Supreme Court of the United States did not disdain to quote from his Abridgment at least as late as that year, with a word of recognition for his work on the Ordinance of 1787; see the *Mormon Church Case*, 136 U. S., p. 65.

§

This has been a long digression, and we must now return to Professor Holdsworth and his History. It would be hard to exaggerate the probable effect on legal scholarship of these nine volumes. Jurists unite in praise of the soundness of the History, historians join in this praise, and general readers are delighted with a law-book which is as readable as Blackstone's Commentaries themselves.

§

The ninth volume begins with *Status*, and first treats of the King. The maxim that the King can do no wrong has had a new lease of life in America, in connection with the immunity of the sovereignty from suit. Courts of claims represent a partial recognition of the duties of the State towards a citizen it has injured, but only breaches of contract are there cognizable. Political economists consider as basic the principle of "State compensation to individuals whom State action has wronged," but they have no intention of fighting the lawyers' fight for recognition of this as a legal doctrine, preferring to rest their case on the declaration that *"reasonable expectation* is a more fundamental thing than legal right,"—see Professor Pigou's paper in the *Economic Journal* for December, 1925. But American lawyers have taken hold, and Professor Borchard's notable series of articles in the *Yale Law Journal* for 1925 and 6 is bearing fruit; Congress appears at last to be near to giving us a statute admitting governmental liability in tort.

§

There is involved at this point the continental "administrative law" which so profoundly interested and disturbed Dicey. This does not mean what English and American lawyers understand by the term,—namely, the principles of government by administrative officers and boards,—but rather the doctrine of the special protection of public officials from suits by citizens (as the critical eye of Dicey saw the situation), or, conversely, the protection of the private citizen from bureaucratic encroachment (as French and German writers insist on putting it). Professor Morgan and Mr. Robinson, in their recent book on *Public Authorities and Legal Liability*, have contributed to the solution of this problem; but for the historical basis we must go, here as nearly everywhere else, to Professor Holdsworth.

§

A sense of difficulty is often expressed in making modern readers (especially in democracies) realize how a proud and powerful people could stand in awe of a frail human being (say Louis XIV), because he happened to be a King; they should have separated, mentally, the State from the person who happened to be the head of the State for the time being. But consider for a moment the idea that the rising generation in the United States has of "Uncle Sam." All American children read the newspapers and see the cartoons. To them "Uncle Sam" is fully as real a person as Louis XIV was to his people, removed from him as they were by a vast and impassable gulf. We see "Uncle Sam" puzzled, sad or angry, often very badly served by his agents, sometimes in trouble or even in danger; but that he can suffer defeat, or do anything foolish or dishonorable or mean, is unthinkable. With this conception in mind, the maxim that the King can do no wrong has some meaning, but is not the less dangerous, as one may learn by studying Professor Holdsworth; we are uneasy at the notion of any kind of sovereign that is above the law.

§

The development of the corporate form,—char-

Holdsworth, William Searle, K. C. 1920; of Lincoln's Inn, Vinerian Professor since 1922 in English Law, University of Oxford; Fellow All Souls College; b. Elmers End, Beckenham, 7 May, 1871; s. of Charles Joseph Holdsworth; solicitor; m. 1903, Jessie A. A. G., d. of Gilbert Wood; one son. Educ.: Dulwich Coll., New Coll. Oxford (History Exhibition, 1890); 1st class History School, 1893; 1st class Law School 1894; Barstow Scholar Inns of Court, 1895; Studentship Inns of Court, 1895; Lecturer, New College 1895; Vice President of St. John's Coll., 1902-3; Prof. of Constitutional Law, University Coll. London, 1903-8; Fellow St. John's College, 1897-1922; All Souls Reader in English Law 1910-1922; B. A. 1893, M. A. and B. C. L. 1897; D. C. L. 1904; Associate Member of the Royal Academy of Belgium, 1919; Fellow of the British Academy, 1922; Hon. Fellow of St. John's College, 1925; Hon. L. L. D. Cambridge, 1926. Publications: Law of Succession, Testamentary and Intestate, 1899; History of English Law, Vol. I, 1903, Vols. II and III, 1909; new and revised edition in 7 vols.—vols. I—III, 1922; vols. IV, V, VI, 1924; vols. VII and VIII, 1925; vol. IX, 1926; Articles in Law Quarterly Review, Juridical Review, Columbia, Harvard, Yale, and Michigan Law Reviews, and the Architect. Recreation: punting, rowing. Address, All Souls College, Oxford; Grandport House, Folly Bridge, Oxford. Club: Golfers.

itable, religious, municipal, and commercial,—is fully treated in this ninth volume.

§

When about to begin the long and interesting discussion of the history of the rules of evidence, American readers will have pride in recalling a prefatory statement to the effect that "the section on Evidence in this volume owes much to Professor Wigmore's great treatise;" which thus confirms the very competent English reviewer of Wigmore's second edition, writing in 1924: "In one department, at least, viz., the historical, it has probably spoken the final word."

§

Pleading and Practice bring the volume to a close. In England they have left all the old rules behind them; but common law declarations, surrejoinders, and pleas in equity continue to flourish in many parts of this country. What is only of historical interest, then, to English readers, is of everyday importance to us. This reviewer confesses that Stephen's Pleading still seems to him one of the few perfectly satisfactory books he has ever read. We are not surprised to learn from Professor Holdsworth that this book kept back the simplification of English rules of pleading for a full generation,—Stephen had so successfully presented the case for the ancient science of pleading, and had so given a new reasonableness to the whole scheme. The system he portrayed is as out of date now as the atomic theory, but we still cling to it, to wit, in Illinois and divers other States.

§

So ends Professor Holdsworth's fine History. "These nine volumes," he says, "contain a history of the sources and general development of English law down to 1700; and a history of the judicial system, and of very many of the principles and rules of the English common law, down to modern times. It is, therefore, not quite a complete history. There still remains to be related the history of the sources and general development of English law during the eighteenth and nineteenth centuries; the history of substantive rules of equity, which became the definite system which we know today, during those centuries; the history of some parts of the common law—notably mercantile law, maritime law, and the law of evidence—which then assumed their modern form; and the history of certain other branches of law—such as ecclesiastical law, prize law, and international law—which fall within the sphere of the civilian's practice. To complete the history as it ought to be completed will be a long task; but I hope to be able to accomplish at least some part of it in the next few years; and I am the more encouraged to begin this final portion of my task by the manner in which these volumes have been received."

§

"I hear," said Burke in the house of commons, in 1775, "that they have sold nearly as many of Blackstone's Commentaries in America as in England." It would be a source of pride, and a most hopeful sign, if we could say the same of the great work of his successor.

We shall welcome Professor Holdsworth to America as one who has deserved well of us, and who has conferred fresh honors on the profession to which we all belong.

CHARLES P. MEGAN

Chicago, February 23, 1927.

The Bankruptcy Act of 1898. Collier Pamphlet Edition, Albany, New York; Matthew Bender & Company, 1926, pages 181. $2.00. Some of the important changes which have been made in our National Bankruptcy Act are included in the amendments of 1926, effective August 27, 1926. These amendments were enacted for the purpose of correcting alleged evils existing in the administration of insolvent estates and are largely the result of agitation on the part of bar associations and creditmen's associations. This pamphlet edition of Collier includes the National Bankruptcy Act of 1898, with the amendments of February 5, 1903; June 15, 1906; June 25, 1910; March 2, 1917, and January 7, 1922, with the recent amendments included in the Act of May 27, 1926, set out in italics. Each section is annotated with cross references to the law, general orders and the official forms. It also includes certain notes referring to the 13th edition of Collier on Bankruptcy. The pamphlet also includes the general orders and official forms in bankruptcy as adopted by the Supreme Court of the United States, together with full annotations on same. An up-to-date hand book of this character fills an important gap in the office of any busy lawyer. It is authoritative and concise, and as to arrangement and completeness of the annotations is, in the writer's opinion, quite the best available.

JOHN J. MCDONALD.

No fewer than seven volumes have been added by the West Publishing Company of St. Paul to the long list of well-known and widely used casebooks that make up the American Casebook Series. Two are already indirectly known to law teachers, viz., Hall's *Cases on Constitutional Law* (pp. 1900, $6.50) and Cook's *Cases on Equity* (pp. 1200, $6.00). The former is a reprint of Dean Hall's original casebook, together with an extensive supplement of new material to add to the old. Each new item bears an indication as to where it belongs. Not only are there many new cases but even much amplification of the valuable footnotes. The only wholly new subject taken up in the supplement is a chapter on prohibition problems. Professor Cook's book is a consolidation and abridgment of his three volume set of cases on equity and in the main follows closely the lines of the larger work, which appeared about a year ago. The other books are wholly new. Of these, that on *Mortgages* by Professor J. L. Parks (pp. 587, $5.00) has a subject of more general interest than the others. It collects the leading American cases, with scant attention to British ones, and with no desire of any radical innovation in the scheme of presentation. Another important subject is dealt with in *Cases on Public Utilities* by Y. B. Smith and N. T. Dowling, both of Columbia (pp. 1758, $6.00). Not only is a good casebook welcome in this field, where there previously was in fact only one available of any real use; it is also valuable because the field is one so rapidly changing in the nature of its make-up. An important part of it is an extensive chapter on rates and rate-making by R. L. Hale. *Cases on Code Pleading* by A. H. Throckmorton (pp. 912, $5.50), like the foregoing, has a subject that is widely taught. Reprints of typical code provisions appear at the opening of each chapter and form the basis on which the subsequent cases rest. By the initial, apparent simplicity of each proposition the subsequently developed difficulties are rendered more striking and, from the teacher's standpoint, their exposition more penetrating. The

remaining two volumes are alike in that they both deal with topics taken up as separate courses in comparatively few law schools. One is *Cases on Federal Jurisdiction and Procedure* by H. R. Medina (pp. 674, $5.00), the other, *Cases on Admiralty*, by G. D. Yord and G. C. Sprague (pp. 837, $5.50). Both are of the informational type, in the sense that their purpose is not so much to train the user in legal reasoning, as to impart information to him as to the nature and content of the rules dealing with certain particular subjects.

Wm. Wood & Co., New York, are publishing Buchanan's *Forensic Medicine & Toxicology*, ninth edition by J. E. W. MacFall (pp. 445. $5.00). The part on toxicology is, of course, wholly international in its scope; the part on forensic medicine is only partly so. The book was written by an Englishman for English medical men to guide them in their professional contact with the law. In describing the details of criminal procedure and the exact nature of the reports that must be made by the medical examiner, as well as other legal subjects, much is said that is only national in its scope. In so far as it supplies pertinent medical information it is, of course, once more international. In these parts, explaining as they do the medical problems raised in a given situation, and means to be used in solving them, will lie the principal value of the book to its legal readers, as naturally and properly enough the strictly legal information carried is only sketchy, just enough to satisfy the needs of the English medical man, and no more.

E. W. PUTTKAMMER.

Leading Articles in Current Law Reviews

OREGON Law Review—February (Eugene, Ore.)—Legislation Relating to Public Companies, by Arthur M. Whiteside; A Business Man's Opinion of the Law, by E. B. McNaughton; Reforms in Practice and Procedure, by O. S. Blanchard; Constitutionality of Tennessee's Anti-Evolution Statute, by Charles E. Carpenter.

New York University Law Review—February (New York)—A Biography of Frank Henry Sommer, by William F. Walsh, D. Frederick Burnett, Alison Reppy; The Fading Bill of Rights, by Frank Henry Sommer.

St. Louis Law Review—February (St. Louis)—Injuries to Infants en Ventre Sa Mere, by A. B. Frey; Presumption of Legal Knowledge, by Frederick G. McKean, Jr.; Recognition in International Law, by O. H. Thormodsgard and Roger D. Moore.

Michigan Law Review, March (Ann Arbor, Mich.)—The Early Liability of a Bailee, by Norman F. Arterburn; The Effect of Foreign Divorce Decree Upon Dower and Curtsey, by Robert W. Wheeler; The Primitive Character and Origin of the Bonorum Possessio, by George M. Bush.

Illinois Law Review, March (Chicago)—Trusts and Escrows in Credit Conveyancing, by George Gleason Bogert; Subjective and Objective Elements in Law, by Albert Kocourek; Legality of Racial Zoning, by Andrew A. Bruce.

Law Notes, February (Northport, N. Y.)—Proximate Cause as Applied to Suicide Clause in Insurance Policy, by W. A. Shumaker; Power of Congress to Punish for Contempt, by Minor Bronaugh.

Texas Law Review, February (Austin, Tex.)—Legal Education and the Association of American Law Schools, by Ralph W. Aigler; The Problem of Appellate Review, by Edson R. Sunderland; Testimony as to Transactions with Decedents, by Maurice Cheek.

Indiana Law Journal, February (Indianapolis, Ind.)—Judicial Interpretation of the Eleventh Amendment, by Charles S. Hyneman; Tender of Less Sum in Full Payment of Liquidated or Unliquidated Claims, by C. Severin Buschmann.

Columbia Law Review, February (New York City)—Depreciation and Valuation for Rate Control, by James C. Bonbright; Conflicting Functions of the Upset Price in a Corporate Reorganization, by Joseph L. Weiner; Some Procedural Aspects of the Statute of Limitations, by Thomas E. Atkinson.

The Cornell Law Quarterly, February (Ithaca, N. Y.)—Judicial Tendencies of the Court of Appeals During the Incumbency of Chief Judge Hiscock, by Leonard C. Crouch; The History and Economics of Suretyship, by Willis D. Morgan; State Inheritance Tax on Foreign-Held Bonds or Notes Secured by a Mortgage on Land in the State, by Melber B. Chambers.

Michigan Law Review, February (Ann Arbor, Mich.)—Sidelights on the Permanent Court of International Justice, by Ake Hammarskjold; The Indeterminate Permit for Public Utilities, by E. Blythe Stason; Joinder and Splitting of Causes of Action, by Charles E. Clark.

American Law Review, January - February (St. Lewis, Mo.)—Intervention in Federal Courts, by Anne Bates Hersman; State Legislation that Hurts, by George C. Lay; The Legality of Chemical Warfare, by Russell H. Ewing; Why Do Courts Coddle Automobile Indemnity Companies? by Charles Claflin Allen; Dates in Documents, by Elbridge W. Stein.

Yale Law Journal, February (New Haven, Conn.)—Conditional Delivery of Written Contracts, by Arthur L. Corbin; The Legality of the General Strike in England, by A. L. Goodhart; Appeals by the State in Criminal Cases, by Justin Miller; Causal Relation in Legal Liability in Tort, by Leon Green.

Iowa Law Review, February (Iowa City)—What Can Law Schools Do for Criminal Justice, by Roscoe Pound; Registration of Title to Land, by Percy Bordwell; Classifications of Cities for Superior Court Purposes, by Wayne G. Cook.

University of Pennsylvania Law Review, February (Philadelphia)—Equity Jurisdiction in the Federal Courts, by Robert von Moschzisker; Economic Factors Involved in Maintenance Provisions of Public Utility Corporate Mortgages Issued in Series, by Luther A. Harr; Torture Under English Law, by Ernest G. Black.

Harvard Law Review, February (Cambridge, Mass.)—Partnership Liability of Stockholders in Defective Corporations, by E. Merrick Dodd, Jr.; Value—By Judicial Fiat, by Donald R. Richberg; Amendment of the Bankruptcy Act II, by James Angell McLaughlin.

HOLDS RECORD TENURE ON SAME APPELLATE BENCH

Unique Distinction of Chief Justice William A. Johnston of Kansas Supreme Court—Now in His Forty-Third Year as Member of This Tribunal—His Influence Upon Law of State—Interest in State Bar Association—"Always Been Too Young"

By H. W. Arant
Dean, School of Law, University of Kansas

FEW men can claim the distinction of having devoted as much as forty years to any type or grade of judicial service. As was perhaps to be expected, the higher percentage of long terms of judicial service is found among the federal judges, doubtless because they hold office during good behavior.

Justice Brewer, of the United States Supreme Court, served a four-year term as judge of the Criminal Court of Leavenworth County, Kansas, and a like term as district judge. Then, from 1870-1910, he divided forty years between the Supreme Court of Kansas, the Circuit Court of the United States and the Supreme Court of the United States. Justice Holmes, now an Associate Justice of the Supreme Court of the United States, became a member of the Supreme Judicial Court of Massachusetts in 1882 and was appointed to the office he now holds in 1902. He is now in his forty-fourth year of judicial service, with that period divided between two courts. Justice Field, after being a member of the Supreme Court of California from 1859-1863, served the remainder of a period of thirty-eight years as Associate Justice of the Supreme Court of the United States. Chief Justice Marshall and Justices Story and Harlan were continuously members of the Supreme Court of the United States for thirty-four years each. The thirty-one years of Justice Brown's judicial tenure was divided between the Circuit and Supreme Courts of the United States.

Among the English judges, the thirty-two year tenure of Lord Mansfield, called the founder of the English commercial law, appears to be about the longest.

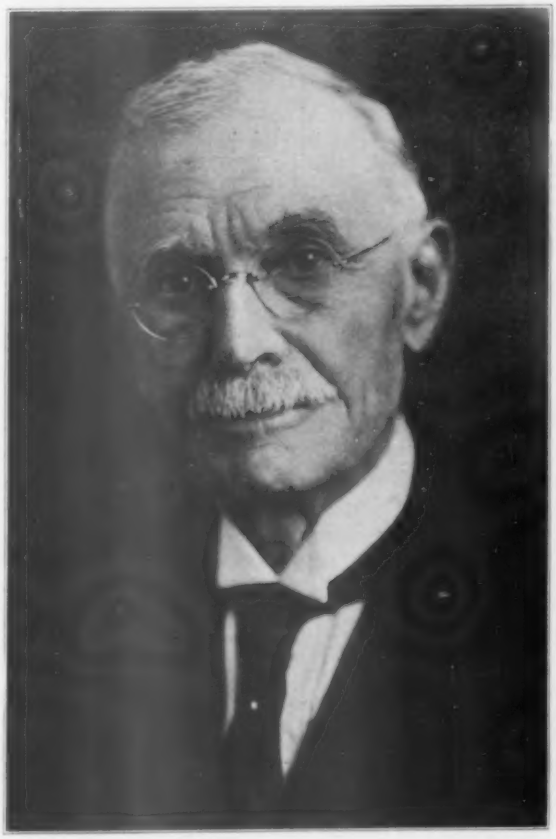
The number of judges of state appellate courts, who have served as long as thirty years, is negligible when compared with the total number who have held office.

Justice Gibson, of the Supreme Court of Pennsylvania, served thirty-seven years, with twenty-six different associates, and his opinions appear in seventy volumes of Pennsylvania reports. Justice Campbell, of Michigan, became a member of the Supreme Court of that state at the time of its organization and was continuously a member for thirty-three years. Justice Cartwright, of Illinois, divided a like period between the Appellate Court of Illinois and the Supreme Court of Illinois. Chief Justice Shaw, of Massachusetts, and Justice Moore, of Michigan, each served continuously for thirty years as a member of the supreme court of his state and Justice Moore, in addition, was a circuit judge for six years previous to his elevation to the supreme bench. There may be a few other state judges who have served as long as thirty years, but it is safe to say that the number is very small.

To Chief Justice William A. Johnston, of the Supreme Court of Kansas, it is believed, belongs the unique distinction of having had the longest continuous tenure on the same bench of any judge of any appellate court. He became Associate Justice of the Supreme Court of Kansas on December 1, 1884, and has been Chief Justice since January 12, 1903. The first of December, 1926, marked the beginning of his forty-third year of continuous service as a member of the Supreme Court of Kansas. He has served with twenty-two different associates and has been elected eight times. The substitution of the primary election for the statewide convention method of selecting candidates never perceptibly affected him and even the wave of populism, which defeated practically every other republican candidate for a state office, did not substantially imperil his usual majority in the general election.

But his long term on the bench does not alone measure the length of his public service in Kansas. He was born on a farm near Oxford, Ontario, Canada, on July 24, 1848. He taught school in his early young manhood and read law while teaching in Appleton, Missouri. He located in Minneapolis, Kansas, in 1872, and was there admitted to the practice of law. In 1875, when only twenty-seven years of age, he began a term as a member of the House of Representatives in the Legislature of Kansas, which was followed by a four-year term in the Senate, during a year and a half of which time he was Assistant United States District Attorney. The year 1879, when he was thirty-one years old, saw his election to the office of Attorney General of the State of Kansas, in which capacity he served two terms and until he went into office as Associate Justice of the Supreme Court at the age of thirty-six. It thus appears that, for more than fifty-one years of the fifty-four that he has been a resident of the State of Kansas, there has been no time when William A. Johnston was not holding an office of importance to the state.

The first opinions of Chief Justice Johnston appear in Volume thirty-three of the Kansas Reports. Those he wrote in the cases decided in February of this year will appear in Volume 122. His opinions appear in ninety consecutive volumes of the Kansas Reports, or about 74% of all the volumes that will be filled by decisions of the court now rendered. Including his opinions in cases decided by the court on February 12, 1927, he has written 2,609 opinions. Among these are 154 dissents and 29 specially concurring opinions. The average length of the report of a case in the Kansas Reports, since he became a member of the court, is a little over three and one-half pages. Assuming the average length of Chief Justice Johnston's opinions to be the same as those of the court as a whole, his opin-



CHIEF JUSTICE WILLIAM A. JOHNSTON

ions would fill no less than twenty-six average volumes of Kansas Reports. Only the lawyer or judge, who knows the labor that is involved in carefully hearing the arguments in cases on appeal, who knows the careful work of the court, as a whole, in consultation and discussion of each of such cases and understands the technique of opinion writing, can appreciate the time and painstaking labor that is involved in the preparation of the opinions that Chief Justice Johnston has contributed to the Kansas Reports. There are very few principles of law, now recognized as obtaining in Kansas, that have not been applied and restated since he went on the bench and it would hardly be extravagant to say that he has participated in an entire restatement of the law of Kansas as far as it is to be found in the decisions of the Supreme Court.

This, however, hardly states the full measure of his influence upon the law in Kansas. He has been an active member of the Kansas State Bar Association from the beginning and was its president as long ago as 1888. He still maintains a keen interest in its proceedings and its objects. When he first became a member of the court, it consisted of three judges. In 1901, by constitutional amendment, the court was enlarged to seven justices and it was provided that the senior judge, in point of service, should be the Chief Justice. This automatically made Judge Johnston the Chief Justice and for more than a quarter of a century he has been the spokesman for the court, answering inquiries from attorneys and announcing for the court such of its decisions as are made from the bench. Three generations of Kansas lawyers have appeared before the court since he became a member of it. There are now practicing before the court sons and grandsons of lawyers who argued to it in the earlier years of his membership. The influence which a court has upon the lawyers who appear before it in its daily work, though scarcely perceptible and never capable of exact measurement, is none the less real and vital.

When a case is being argued, the Chief Justice appears to be especially attentive and rarely takes his eyes off the lawyers before him. His manner is dignified and positive and shows that fine courage that always results from being honest with one's self as well as others. His courtesy is unfailing and his consideration for the young men who are just beginning to practice before the court has been the subject of frequent comment.

He knows practically all the lawyers of the state and thousands of other citizens besides. His work is frequently interrupted by visits which no one seems to hesitate to make, but he has developed a remarkable capacity to take up right where he left off as quickly as a visitor is outside of his office.

Chief Justice Johnston went into the office of Attorney General at the time of the adoption of the Prohibition Amendment. As attorney general, he directed much of the early prohibition litigation and, as a member of the Supreme Court, he later passed upon most of the legal questions raised by prohibition legislation. Probably no other Kansan has been so closely associated with the prohibition movement in his state or influenced it so much as he.

Reminiscing not long since, Judge Johnston said: "The Kansas bar has made a distinct advance during my time on the bench. It was good in the beginning and it has been growing better all the time. There is a distinct improvement in the general ability of lawyers today, reflected both in their briefs and their arguments.

"Lawyers before the Supreme Court are more decorous these days than forty years ago. There is less indulging in personalities. The conduct of lawyers in the Supreme Court, however, always has been commendable.

"The character of the lawsuit has changed greatly since I came on the court. In those days we were greatly concerned in Kansas as to whether counties could vote bonds to be used by railroads in constructing their lines. There were many legal problems to be confronted in the development of a practically new state. Regulation of public utilities was then unheard of. Railroads contended that they were not subject to regulation. There was a larger percentage of criminal cases."

The Chief Justice has always been a powerful man physically and possessed of strong will power and great determination. Although past the middle of his seventy-ninth year, he is still going strong, retaining his alertness, mental vigor and an unusual physical strength. His accustomed, keen interest in people and public affairs is undiminished. He observes the regular working hours every day, and still takes his proportionate share of the work of the court.

He was elected Attorney General at the early age of thirty-one. He then wore a healthy accumulation of whiskers that he might appear to be as old and wise as was expected of one who had his responsibility. Only the mustache now remains.

"They told me I was too young then," he said. "That has been my difficulty all along. I always have been too young."

AMERICAN BAR ASSOCIATION JOVRNAL

Subscription price to individuals, not members of the Association nor of its Section of Comparative Law, $3 a year. To those who are members of the Association (and so of the Section), the price is $1.50, and is included in their annual dues, $6. Price per copy, 25 cents.

JOSEPH R. TAYLOR, MANAGER
Journal Office: Room 1119, The Rookery Bldg., 209 South La Salle St., Chicago, Illinois

THE "THREEFOLD NECESSITY" IN EFFECTIVE LAW ADMINISTRATION

It happens that this issue of the Journal contains articles which forcibly call attention to the three things which are absolutely necessary to an effective administration of Justice—which lie at the very foundation of the machinery and without which all subsequent tampering, all random appeals to the fetich of legislativism, must be of no avail. These three things are the ability of Bench and Bar to discharge their proper functions, by reason of character and education; the power of the Courts to provide effective methods for the conduct of their business—the Rule-Making Power; and the possession by Judges of the will to assert the power and the dignity of their tribunals, particularly where improper use is made of matter involving their proceedings. To put it briefly, the threefold necessity comprises the professional ability to act, the power to act, and the will to act—and the last is by no means the least of these.

The hearing of the New York Court of Appeals on the petition of the Bar Association of the City of New York and the New York County Lawyers' Association for an increase in the preliminary requirements for admission to the study of law to two years of college work emphasizes the fundamental requirements of education and character. There is certainly a clear correlation between the two, no matter what may be the case when merely individual instances are considered. In calling for better educational requirements these two associations are at the same time demanding assurance of moral fiber in the men who are to constitute the Bench and Bar of the future. Their insistence, as our report of the hearing shows, was particularly on the necessity for reasonable preliminary preparation for the study of the law, and the exhibits presented left small doubt as to the need of action. The petition filed for these organizations with the court put the matter strikingly when it said, "Your orator believes that four years in college and one year in law school will make a better lawyer, other conditions being equal, than four years in law school and one in college." Certainly the applicant with a real preliminary education has a solid foundation on which to build ultimately a solid superstructure of professional ability, while only the very exceptional student is likely to overcome the handicap of undertaking the serious and difficult study of law with no appreciable background of mental discipline or general information. For lawyers, at least, there is slight room for argument here. A well-trained Bench and Bar are a prime necessity, if Justice is to be more than a name.

When we come to the power to act, we are dealing with an aspect of the subject no less important. What advantage is there in a Bench and Bar capable of a high degree of efficiency, if by reason of outworn rules and discredited custom the courts are prevented from taking the simple measures necessary to secure that efficiency? Why drape Justice in her august robes and then deny her the sword that cuts through useless details of procedure and thus weight the scales in favor of delay? We have devoted a great deal of space in the Journal in the past to articles on the necessity for a resumption of the rule-making power by the courts as a condition precedent to improvement. It is one of the main objectives of the present movement. We are glad in this issue to cooperate with the committee of the Conference of Bar Association Delegates by printing a supplement containing the views of the chairman and members of that committee on this important matter. This is a principle to which the American Bar Association has long been committed and which it must continue to emphasize unless it wants to abandon the entire campaign for improvement. Congress has adopted the principle in the creation of many new tribunals, because of its simple and patent utility. It has accepted

it as far as the equity, bankruptcy and admiralty jurisdictions of the Federal courts are concerned. All that remains is for it to deal in the same business-like manner with the law side of their jurisdiction. In the states a clear appreciation of the necessity of joining power and responsibility should lead to this beneficial step.

But Education and character and the power to act will be of no avail without the will to act, and this brings us to the fact that a great deal can now be done by judges in respect to present conditions. The Baltimore judge who resolutely asserted the dignity and power of his court by dealing with those guilty of improper publication in connection with matters pending therein set an example which the Court of Appeals of that state promptly sustained. This incident, which is dealt with in an article on "Cooperation of Press and Bar" in this issue, is merely one illustration of what a judge can do if he is inclined to protect litigation in his court from improper outside practices. It further illustrates the fact that such a course is by no means necessarily provocative of hostility on the part of those affected. The responsible press doubtless wants to have some more definite idea of what is and is not improper publication, and there is every reason to expect its cooperation in justifiable assertions of the right and dignity of the tribunals. But the will to act can find other and equally important fields. The Illinois Supreme Court boldly asserted its power to determine the qualifications of those to be admitted to the Bar and its action provoked no real protest. Some time since we printed in the Journal an editorial setting forth the view that the courts could and should resume the rule-making power as an inherent right of which no legislature could deprive them.

In its emphasis of this "threefold necessity" in judicial improvement the Bench and Bar have the right to ask and expect the support of the public. If the character of some members of the Bar is justly subject to public criticism, the public should be willing to approve the well-considered steps proposed to shut the gates against incompetent applicants. If the processes of the administration of Justice are inadequate, the public should be willing, through its legislative representatives or otherwise, to insist on putting the power to act in the hands of those from whom effective action is demanded. If the scenes in and around courtrooms and the method of publishing proceedings affront at times the public's sense of propriety, it should be prepared to sustain the assertion of a reasonable measure of control on the part of the Bench.

OPPORTUNITY FOR POOR BOYS

A noted Englishman once said that one trouble in that country was "the insane liberty of affirmation" that prevailed there. A similar tendency to utilize the freedom of assertion without proof, which equally prevails on this side, is found in the repeated statement that higher qualifications for admission to the Bar would deprive the poor boy of his chance to enter the profession.

A memorandum presented to the Court of Appeals of New York at the recent hearing on the petition for two years of collegiate training as a preliminary to law study, gives some striking and convincing figures on the point. The fact that poor boys can readily acquire a collegiate education is shown conclusively by the very large number of them who are doing it, and earning money to pay their expenses in whole or in part during the process. For instance, the student employment bureau of New York University estimates that "between 18,000 and 20,000 of the 30,000 students of New York University are partially supporting themselves by outside work." About half of Columbia University's 22,000 students "are enrolled in the night and late afternoon courses, and all of these are largely self-supporting, many of them entirely so. Of the 11,000 day students, it is estimated that fifty percent are partially self-supporting and an additional fifteen percent are entirely so." It is estimated that sixty percent of Harvard students are engaged in some form of remunerative employment. And the same is true of many other institutions mentioned.

Taken as a whole, the statistics and other information presented in the memorandum fully justify the statement that "the opportunities in New York State for free collegiate education are so many; the opportunities for a student of limited means to earn his way through college so many and so varied; the amount of loan funds available for loans to needy students so large; and the number of evening and late afternoon classes where a student who must work during the day can get college training after hours so great, that no boy or girl today can plead a lack of resources as an excuse for failing to secure a college education."

DEPARTMENT OF PROFESSIONAL TECHNIQUE

Practice in the Supreme Court of Illinois*

By Hon. Floyd E. Thompson
Justice of Supreme Court of Illinois

EVERY member of the Bar is a public officer commissioned by the Supreme Court to serve during good behavior. He is an essential part of the judicial department of the government. This department is administered by two classes of public officials,—the judges, whose duty it is to hear and decide, and the lawyers, whose duty it is to give counsel to the public and to present causes in court and to advise and assist the judges. Every lawyer takes an oath of office by which he swears or affirms that he will support the constitution of the United States and the constitution of the State of Illinois, and that he will discharge the duties of the office of attorney and counselor at law to the best of his ability. The faithfulness with which he discharges this duty has much to do with the public estimate of the courts. Whenever, through the ignorance or neglect of a lawyer, a client is wrongly advised, a contract or conveyance of property faultily drawn, a will drawn which does not legally express the wishes of the testator, a case inadequately prepared and incompetently presented, or when there is a miscarriage of justice through the unscrupulous conduct of a lawyer, or when there is suspicion that a lawyer has tampered with a jury or has given advice which enables a man or group of men to violate the spirit of the law, confidence in the agencies charged with the administration of justice is to that degree shaken.

Proper preparation is necessary for the success of any journey, whether it be for business or for pleasure, but there is no journey where preparation counts for so much as a journey through the courts. This preparation should begin before the action or suit is begun, and in order to make the way through the Supreme Court smooth, every right of the client should be protected in the trial court and every ruling of the trial court should be properly saved for review. The traveler with a just cause will not find the route through the Supreme Court beset with dangerous hazards or insurmountable obstacles, if proper care is exercised and careful attention is given to details. The scope of this informal discussion does not extend to the preparation or presentation of a case to the trial court, nor to the different steps to be taken to get the case at issue in the Supreme Court. I shall confine myself to a few suggestions,—many of them academic but nevertheless important,—regarding the preparation of a case and its presentation to the Supreme Court and the different stages through which an ordinary case goes before final disposition is made of it.

Cases are most frequently brought to the Supreme Court by appeal from or writ of error to the trial court. An appeal is statutory and is a continuation of the same action or suit. A writ of error is a new suit begun in the Supreme Court. The statutes and rules of court should be carefully consulted and followed so that the court will not be compelled to give judgment on a technical point of procedure. A simple brief of the different steps to be taken and the time within which each step must be taken ought to be prepared and kept in every lawyer's office for ready reference. This should be carefully revised after each session of the general assembly. It will save much time and often great embarrassment. Where a limit within which a certain step must be taken is fixed by statute, the court cannot extend the limit without express statutory authority, but where the limit is fixed by a rule of court, the court, or (if given authority by the court or the rule) any judge thereof in vacation, can grant further time where proper showing is made. Rules are necessary for the proper and orderly dispatch of the business of the court and lawyers should observe the rules thereby assisting the court with its work. The court is glad to accommodate the lawyers by granting further time, where further time is shown to be necessary for proper presentation of the case, but if time were extended in many of the cases it would greatly interfere with the work of the court, and lawyers render a great service by getting their work done on time.

Appeals from and writs of error to trial courts in all prosecutions for felony and in cases in which a franchise or freehold, or the validity of a statute, or the construction of the constitution, is involved, and in all cases relating to revenue, or in which the State is interested as a party or otherwise, and in certain other cases especially provided for by statute, are taken directly to the Supreme Court. All other cases are reviewed by the Appellate Courts. In all cases of which the Appellate Court has jurisdiction, except criminal cases, its judgment is final, provided the Appellate Court does not certify that the case decided by it involves questions of law of such importance that it should be passed upon by the Supreme Court, in which case a further appeal may be prosecuted to the Supreme Court, and provided the Supreme Court does not on proper petition for writ of *certiorari* require the case to be certified for its review and determination. Where the defeated party desires a further review of a case of which this court has jurisdiction and where the Appellate Court refuses the certificate of importance, the party files a printed petition for writ of *certiorari*, together with an abstract of the

*From a lecture delivered before The Chicago Bar Association, December 11, 1926, by Honorable Floyd E. Thompson, one of the Justices of the Court.

record of the trial and Appellate Courts in the form prescribed by Rule 36.

A copy of this petition and abstract is delivered to the chambers of each of the judges of the court. Each judge reads and considers it and reaches his conclusion of the merits of the petition. After all the judges have had time to read and consider the petitions the chief justice calls a conference on them, and each judge is then called upon to express his views and to vote. If four favor the granting of the writ, the petition is allowed; otherwise, it is denied. Frequently, where three of the judges are convinced that the judgment of the Appellate Court is wrong, some judge who voted to deny the writ will change his vote so that the case may be further considered. The statute authorizing this practice gives the party, defeated in the Appellate Court, an opportunity to have the judgment of that court reviewed by the Supreme Court, but saves the Supreme Court the work and time of writing opinions in those cases in which the judgment of the Appellate Court is right. The opinion of the Appellate Court is not reviewed on consideration of these petitions. The Supreme Court may not agree with some of the reasons assigned by the Appellate Court for the conclusion reached by it, but will deny the writ if the conclusion reached by the Appellate Court is right. The same plan that is followed in consideration of petitions for writ of *certiorari* is followed in the consideration of petitions for writ of error in compensation cases. Every judge passes on each case, and the cases are then assigned to the several judges to announce from the bench the conclusion of the court. These petitions should state the points clearly, but concisely, and the points should be supported by suggestions and authorities. Much that is said hereafter concerning briefs applies to petitions. Perhaps it is not out of place to say here that there is serious need of legislation limiting jurisdiction of the Supreme Court in this class of cases so that the court will have time to give more consideration to cases involving important questions of law.

The court desires that every case shall be considered and decided on its merits. It entertains motions at every term to correct errors in the record, abstract or briefs, as filed, or to supply some omissions. The court is liberal in granting these motions where good cause is shown and where it has authority to grant the request. Motions are filed with the clerk and he presents them to the court at the opening of court on the first court day following the day of filing. All motions must be in writing, and when based on matters which do not appear of record they must be supported by affidavit. Where the motion involves other than formal matters, it ought to be accompanied by written suggestions in support of the motion, but these suggestions should be brief and to the point. A copy of the motion and suggestions must be served on opposing counsel in time for him to have opportunity to answer it, and proof of service must be filed with the motion. Objections to the allowance of the motion must be filed in writing and may be supported by suggestions. All motions are read orally in conference and receive the consideration of every member of the court. The conclusion reached by the court is announced by the judge to whom the motion is assigned for that purpose. When the court is in vacation the several judges have authority to enter an order granting most formal motions. Much of the court's time is wasted by the reading and consideration of motions that have no merit. All of this time wasted by inconsiderate members of the bar is lost to the people of Illinois. It is badly needed for the consideration of important litigation.

The party bringing a case to the Supreme Court must furnish a complete abstract of the record in the form prescribed by rules 14 and 16. Where the record contains the evidence, it must be condensed into narrative form in the abstract so as to present its substance clearly and concisely. The abstract must be sufficient to present fully every error and exception relied upon, and it will be taken to be accurate and sufficient for a full understanding of the questions presented for decision unless the opposite party shall file a further abstract making necessary corrections or additions. If an abstract is skillfully made, much immaterial matter can be greatly condensed. The abstract must show that it is complete and must contain a complete index of the matter abstracted. The appellant or plaintiff in error must, in all cases, assign errors at the time of filing his record, and these errors must be written upon or attached to the record and must be printed in the abstract. Additional errors may be assigned by leave of the court or of one of the judges whenever it shall appear to be necessary to a full presentation of the case.

Each party is required by rules 15 and 16 to file 15 copies of a printed brief. A properly prepared brief consists of three distinct divisions—the statement, the propositions and authorities, and the argument. These divisions should be kept separate. We often find the same statement repeated in each of the three divisions of the brief. This is unnecessary and is not helpful to the court. Every statement should be carefully weighed and considered before it is printed in the brief. Frequent misstatements cause the court to lose confidence in the brief and in its author. Whether made inadvertently or wilfully, misstatements are inexcusable. If the former, especially if they occur often, it is the result of carelessness, and if the latter, counsel violates his oath, brings disrespect on the profession that honors him, and subjects himself to suspension or removal. Briefs should not contain extravagant statements nor immaterial and heated discussion. The court wants light, not heat. They should never contain disrespectful statements concerning opposing counsel or the trial court. If criticism is justified, a reasonable amount in the right way is, of course, permissible, because no attorney or court is above just criticism. Unless there is a real basis for criticism, it is always best left unsaid. If the author of the brief will bear in mind that these briefs are read by the several judges in the solitude of their offices, they will see at once that page after page of disrespectful and heated criticism and flights of oratory of the street corner variety are neither entertaining nor enlightening. If the writer of a brief will place himself in the position of the court and keep in mind that the court is interested only in the merits of the controversy and that it wants to get the facts and the law applicable to the case, with the least cost of

time and effort, he will write a better brief and will serve his client better. The members of the Supreme Court of Illinois have little time to be wasted. They spend five months of the year attending sessions of the court, and each judge must write about seventy-five opinions and read and consider about 450 opinions written by his associates in the seven months that remain. These are facts, not theories. The judges' time is yours. It is all bought and paid for. But when they have given you all their time they cannot give more. The typewriter is a great invention and has filled a great need, but it tends to make those who have the services of a stenographer and the use of a typewriter verbose. A liberal use of the blue pencil by the brief writer will save the court much unnecessary labor. When the brief is long an index is helpful.

The statement of appellant or plaintiff in error should contain a short and clear statement of the case including first, the form of the action; second, the nature of the pleadings sufficient to show what the issues were in the trial court and to present any question subject to review arising on such pleadings; third, in cases depending upon the evidence, the leading facts which such evidence proved or tended to prove; fourth, how the issues were decided upon the trial and what the judgment or decree was; and fifth, the errors relied upon for a reversal. The statement should be full, but concise, so that the court can fully understand, after reading it, all the questions at issue. There is no occasion for setting out the pleadings at length where no question of pleading is presented for review. The statement should be a mere recital of the facts without argument and without detail. If the facts are controverted, this can be suggested in the statement without giving the brief writer's views. In this part of his brief he should let the facts speak for themselves. When the questions for review do not depend upon the evidence, only enough should be stated to give the court the information necessary to understand the questions presented. When the case does depend upon the evidence, it is neither necessary nor helpful to set out at length the testimony of each witness, naming him. State the evidence in a narrative form with proper references to the abstract and record pages, thus: (A. 20; R. 75.) and the court will refer to the abstract for the details where they are necessary. No lawyer gains anything by making an unfair statement. He loses the confidence of the court at the very outset of his case. The statement of appellant or plaintiff in error will be taken to be accurate and sufficient, unless the appellee or defendant in error shall point out wherein it is inaccurate or insufficient. It is unnecessary and improper for appellee to restate the case in his brief unless the statement of the appellant is so unfair and inaccurate that a restatement is necessary for the court to understand the questions at issue. The statement of appellee should usually consist of the propositions by which he seeks to meet the alleged errors assigned by appellant or by which such errors are obviated. All argument or discussion should be reserved for the third division of the brief. Too much emphasis cannot be placed upon the importance of a clear, concise, comprehensive statement of the facts. It is not unreasonable to assume that the judges of any court of review will know something of the law applicable to any case that may be presented to them, but it is certain that they will know nothing of the facts of a particular case until informed by statement of counsel. A familiar proverb of our profession is that "A case well stated is more than half argued."

The second division of the brief should contain the propositions of law relied upon by counsel in support of his side of the case. The propositions should be set forth under appropriate headings. They should not contain any statement of facts nor any views of counsel. If the case is one where there can be a question of jurisdiction the first proposition should deal with this question. The proposition should be short and to the point, followed by the citation of authorities supporting them. As a general rule, the fewer the authorities, the better. If the proposition is settled by repeated decisions of our Supreme Court, then two or three well-selected cases are ample. If there are no decisions in this State, then a few leading cases from other jurisdictions will ordinarily suffice. If there is no conflict in the authorities, three or four well-considered cases are enough, but if there is conflict among the courts of other jurisdictions, then counsel would be justified in citing leading cases from each jurisdiction sustaining the view contended for by him, and such citations would be very helpful to the court. There is no necessity for citing a large number of cases from the same State,—one or two leading cases from each State is better. Of course, no hard and fast rule can be stated, but the tendency is to cite too many cases that are not directly in point. This is confusing and a waste of the court's time. Judges are human, despite statements to the contrary, and they naturally lose confidence in a brief after they have read several cases cited and find that they are not in point. If the author of the brief will read his cases with care and cite only those that are most nearly in point, both on the law and the facts, he will render a great service to the court.

Quotations from authorities are rarely necessary or helpful. The tendency is to quote entirely too much. If a quotation is deemed advisable, it should be a sentence or two. Cases should be cited by their full title, followed by the number of the volume, the name of the jurisdiction and the page of the report where the case begins, and the page where the point discussed can be found, thus: City of Chicago v. Tribune Co., 307 Ill. 595, 601. If the citation is from a foreign jurisdiction and is reported in the reporter system or some selected case system, the title of the case should be followed by the volume and page of the official reporter and the volume and page of the other reporter. Where the decision is cited for the second time in a brief, the number and page of the volume should be repeated. When any other method is used it requires time to refer back to the first reference. Never cite a textbook nor an encyclopedia without reading the authorities, or some of them, cited in support of the text. This applies to writers of opinions as well as brief writers. Many of the citations will be found to be inaccurate, some bearing indirectly on the point and some missing the point altogether. There are many well-written lawbooks which cite well-selected authorities. The citation of these works is helpful and advisable. Every lawyer must decide for himself the best method to use in the preparation of his brief, but no lawyer can pre-

pare a good brief without a full knowledge of the facts in the case and without diligent and exhaustive study of the law applicable thereto.

The printed argument should be divided into the same divisions as the brief and should follow that order. Care should be exercised in making these divisions. Too many divisions cause needless repetition and are confusing to the court. It is in this division of the brief that the court expects to find and is entitled to have the views of counsel. He should state honestly and fairly his views of what the evidence shows and should apply the law to the facts as he sees them. Some lawyers have a tendency to scatter their argument over too much territory. If a lawyer has confidence in his case, he should select the points which have real merit and confine his argument to them. Too much stress laid on minor points weakens the argument on the major points. Lack of preparation is usually the cause of a multitude of unimportant contentions. Long argument on a point that is not fairly debatable always weakens the whole argument. It is often advisable to cite and probably to quote from leading authorities, but there is great danger of abusing this practice. Quotations should always be brief and directly to the point. It is impossible to lay down a general rule that will indicate the order in which points should be briefed and argued. Ordinarily, if counsel has a point which he thinks disposes of a case, that is the point that ought to be argued first. The brief of appellee or defendant in error should answer the points in the brief of appellant or plaintiff in error in order, and then, if necessary, should present further argument why the judgment or decree should be affirmed. The practice of discussing each authority cited by opposing counsel is neither necessary nor advisable. Usually, if cases are considered not in point, the mere statement of this view with the reason is sufficient to call the court's attention to the matter. If certain cases are relied upon as decisive of the controversy and there are particular points of distinction, it is of course the duty of opposing counsel to distinguish the authority, and a proper treatment of it will be of great assistance to the court. Here is opportunity for real service to the client and to the court, and at no place in the presentation of the case is there greater opportunity for counsel to display skill than in selecting authorities cited by opposing counsel that need distinguishing and pointing out the distinguishing features.

Whether oral argument is advisable depends upon the case. The lawyer has a right to argue his case orally if he desires, and if the case involves novel questions of law, or the controlling facts are complicated and difficult to assemble, it should be presented orally. No lawyer ought to attempt oral argument without special preparation. He should select the points he wishes to present orally and carefully prepare his argument so that he can give the court a clear understanding of the law and facts without reference to notes or books and without needless repetition. A proposition once stated clearly will suffice. Counsel should begin his statement with a clear statement of the issues and of how they were decided by the trial court. There is a mistaken impression at large that the judges of the court have read the briefs before the case is called for oral argument. The judges do not receive the briefs until the cases are assigned at the end of the term, so the first information they have of the case called for oral argument is the statement made in the opening argument of counsel, except where the case is filed pursuant to the granting of a petition for writ of error, writ of *certiorari*, or some original proceeding in the Supreme Court. After the court is advised of the issues and of how the trial court decided them, counsel should argue only the important points made in his printed argument. The case is not decided on the oral argument, and he does not waive any of his points by failing to argue them orally. It is probably well to state all the points and then argue those he considers are of sufficient importance to be presented orally. If the question is the construction of a will, contract, statute or other document, only that part necessary to an understanding of the point under consideration should be read. It is usually best to state the substance of the document and then read only the particular sentence or sentences involved. If the case be one resting on the testimony of many witnesses, it is a waste of the time of the attorney and the court to name the witnesses who testified and to recite in detail the testimony of each witness. On reflection, it is apparent to anyone that the judges could not possibly remember such details and carry them in their minds until the opinion is to be considered at the next term of court. The court will get the details from the abstract. Usually, all the witnesses for one side can be treated in a general statement that the evidence for that side of the case shows a certain state of facts to exist.

If the argument is carefully prepared, the ordinary case can be presented fully in half an hour for each side, while an unusually long case involving many points can be fully argued in an hour for each side. A good oral argument is always helpful to the court. Some of the best oral arguments we hear are by the young lawyers. They are not usually crowded with work, and the novelty of appearing before the Supreme Court probably causes them to take unusual pains with the preparation. Too many times the older lawyer trusts to his memory for matters that occurred in the trial court many months before. Frequently, when several lawyers are employed in a case, they all come to argue orally. I have never seen good results from this. The ordinary case can be much better presented by one lawyer. Of course, there are exceptions to this as there are to most of the general statements I have made. An oral argument on one side of a case is of very little help to the court. When the case is argued orally on both sides, the court considers the oral arguments at the close of the day's session, and each judge expresses the view he has gained from the argument. The oral argument, if properly presented, and the views of the members of the court are helpful to the writer of the opinion; and the argument, if well made, is especially helpful to the other members of the court and saves them much time in the consideration of the opinion after it is submitted.

Counsel for the defeated party may file a petition for rehearing. Notwithstanding the impression to the contrary, these petitions receive the attention of every member of the court. The first week of the term is devoted to their consideration. At the opening of the term each petition is taken up

in regular order and it is read aloud in conference by the judge who wrote the opinion, each of his associates following with his eye his copy of the petition. If an associate has a question, he interrupts and asks for it. The record, abstract, and briefs are on the conference table for ready reference. There is no necessity for a new argument of the case, and it can be readily seen why the rule requires that the petition shall be brief. After the reading of the petition is completed, such discussion as each judge desires takes place, and after the discussion ceases the roll is called by the chief justice and the result is announced in accordance with the majority vote. If one or more of the judges desire further time to look into the case before voting and their vote is necessary to a decision of the case, it is held, to give them time to investigate the record and briefs. The author of the opinion receives from the clerk a copy of the petition as soon as it is filed, and he considers the petition with the briefs and prepares to state his position with reference to it. He may ask leave to modify some of the language of his opinion or he may feel that the case ought to be further considered and ask that a rehearing be granted. If he feels safe in his opinion, he is prepared to defend it in conference and answer promptly questions asked by his associates. Every member of the court welcomes a petition for rehearing when points have been overlooked or misapprehended by the court. No judge wants an opinion to stand which is not right, and he is glad to have the lawyers who are familiar with the case point out any errors. There is no department of the work of the Supreme Court where more time is wasted than in reading and considering petitions with no merit whatever; at least half of the petitions filed reflect no credit to the lawyers filing them. If the petition is granted, the opposite party may answer the petition and the petitioner may reply to this answer.

In speaking of his experiences, Hon. John H. Clarke, formerly justice of our highest court, made this significant statement: "The first impression made upon me by my service as a member of the Supreme Court was that of surprise at the great number of cases finding their way into that court which are of entirely negligible importance, whether considered from the point of view of the principles of law or of the property involved in them. That impression has been intensified as time has passed, for their number constantly increases." This experience is not new, for I am sure that every judge of a court of last resort finds cause at every term to wonder what prompted the lawyer to bring a case up for review which is so devoid of merit. Whatever motive impels such practice, it is an injustice to the people of the State. It results in a great waste of time of the judges and in imposing upon them much unnecessary and fruitless labor. There are constantly pending before our courts of last resort cases the decision of which intimately and profoundly concerns the lives and welfare of thousands of men and women, and such cases demand not only the time but the energy and ability of the judges. No judge with that sense of responsibility and duty to his State which every Supreme Court judge may be assumed to have would participate in deciding such important cases without making an exhaustive examination of the facts and the law, and men carrying such responsibility should not be harassed and annoyed by the investigation of trifling and unimportant cases. The people are entitled to have their time and strength reserved and conserved for use in the investigation and decision of questions of public interest and importance which are constantly being presented to them. While there are drones in every hive, on the whole the judges of our courts are able and industrious men. Their decisions are generally right and when they are manifestly so there ought not be an attempt to review them. Every lawyer therefore owes a duty not alone to the judges but to the public to ask himself candidly as a citizen rather than as an advocate whether a case which he proposes to carry to the courts of review is of sufficient importance to justify his imposing the labor of an examination of it upon the court of last resort organized primarily to deal with matters of general public interest. Certainly, there is nothing but disappointment and loss of professional prestige for those who pursue an unworthy case into a court of review. Therefore, private interest and public duty unite to impress upon our profession the obligation to refuse to carry any but important cases to the Supreme Court. . . .

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DEPARTMENT OF CURRENT LEGISLATION

Statutory Solutions of Multiple Death Taxation

By Leo Brady

WIDESPREAD dissatisfaction[1] with multiple taxation on the transfer of personal property indulged in by many states and based on several theories of jurisdiction will be diminished to some extent by the decision of the Supreme Court in Frick v. Pennsylvania.[2] One door has been closed as a result of the holding that as to tangible personal property, only the state in which the property had acquired an actual situs could constitutionally impose a transfer tax. Prompt legislative changes were made in the existing tax laws of six of the thirteen states whose legislatures convened in 1926 in order to have the local law satisfy the requirements of due process as laid down by the Supreme Court in the Frick case. The court delivered a further blow to the fast failing fictional doctrine of mobilia sequuntur personam.

Before noting the statutory readjustments it ought to be said for the old mobilia rule that it probably did serve a useful purpose in its day. But its day passed and the Supreme Court simply applied the maxim *cessante ratione, cessat lex*. The origin of the rule can be traced to the Middle Ages when personal property consisted chiefly of gold and jewels and could be carried with the owner or secreted in spots known only to himself.[3] Therefore, since movables did in fact follow the person the law became settled, the rule was applied and waxed strong as the chain of precedents grew. But it was not an unscarred doctrine that presented itself for a further test to the Supreme Court in the Frick case. For many years before the same court had held[4] that a direct property tax could not be levied at the domicile of the owner on tangible personal property if that property had acquired an actual situs without the State, but the rule still lingered and was applied for purposes of inheritance taxation until the Frick decision was handed down. The Court had previously entertained a notion that there was a distinction between a property tax and a succession tax.[5] In the Frick case the court said that the tax was not a property tax as urged but a transfer tax; however, in either case jurisdiction was necessary and such jurisdiction was here absent. It should be noted that besides holding on the question concerning tangible personal property, the court at the same time made an interesting observation as to the power to include intangibles in the estate, namely, stocks and bonds issued by corporations created in other states and held without the state. Pennsylvania made no deduction for taxes levied in the state of incorporation and the court held this error, saying in effect that states which created corporations issuing stocks which form part of the estate of a deceased person may impose a tax upon the transfer of the stock, and prescribe means for enforcing it, which practically gives them the status of lienors in possession, irrespective of the owner's domicile or the actual situs of the stock certificates. The power of a state administering an estate of a decedent owning stocks of corporations of other states to tax the transfer of such stocks, is limited to the value of the stocks in excess of the tax imposed by the states where the corporations are located, for the transfer of the stocks. The power of Pennsylvania to levy a tax on this amount was not questioned.

The Court characterized as unsound the argument that the state of domicile could tax because the law of the domicile in general regulated the transmission of personalty having an actual situs in other states, and, in the words of the court, "obviously the accepted domiciliary law could not, in itself, have any force or application outside that state. Only in virtue of its express or tacit adoption by the state of the situs could it have any force or application in them. Through its adoption by them it came to represent their will, and this was the sole basis of its operation there."

There are interesting variations in the response which the legislatures have made to the decision in Frick v. Pennsylvania, Kentucky, chapter 176, 1926, now taxes the transfer of *all tangible personal property* of non-resident decedents within the jurisdiction of the state. Formerly the state imposed such a tax on *all personal property* of non-residents within the jurisdiction. It would appear that Kentucky has cut down its power to tax personal property of non-residents since the former law included intangible as well as tangible personal property, and it is well settled that a tax on intangibles which have acquired a business situs are taxable.[6] Either Kentucky failed to appreciate the significance of the holding of the Frick case, or it realized the policy behind the decision and wanted to lend a hand in arriving at a common sense solution of the general problem.

Rhode Island, chapter 810, 1926, now expressly exempts from the transfer tax of its resident decedents tangible personal property having *an actual situs* outside the state along with the previously exempt real property located without. This is a submission to the decided question in Frick v. Pennsylvania. As to non-residents, Rhode Island formerly levied no tax on personal property, except such as that over which the non-resident exercised or failed to exercise the power of appointment derived from a resident. On the other hand the legislature takes advantage of the suggestion that tangible personal property should be taxed. It provides for a transfer tax on tangible personal property having an actual situs within the state.

1. Report of the National Committee on Inheritance Taxation, 1925.
2. 268 U. S. 473.
3. Pullman's Palace Car v. Pennsylvania, 141 U. S. 18, 22.
4. Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194.
5. See language of Eidman v. Martinez, 184 U. S. 578 at 582, Nathaniel Seefurth, 25 Columbia Law Review, 870 at 871.
6. Cooley, Taxation, 4 ed., vol. 2, section 4 65.

As busy as New York was in amending and passing statutes reaching a total of nearly 900, the Assembly saw fit to amend the tax law by exempting from the value of the gross estate of the decedent tangible personal property having an actual situs outside the state. Previous to this change only real estate located without was exempt.

It is interesting to note the care exhibited by the draftsmen of the Rhode Island statute and to a lesser extent, the New York provision. The Frick case held that an actual situs without the state of domicile was necessary to prevent the state of domicile from taxing tangibles, and as a corollary, it is evident that there must be *an actual situs* within the state to permit such taxation. The Rhode Island statute conforms to the holding perfectly. New York is not so explicit but shows a proper understanding of the holding by its language, using the words *actual situs*.

Quick response was shown in Massachusetts by an amendment made in chapter 148, 1926. The effect now is to render taxable all tangible personal property of a non-resident decedent, *within the commonwealth*. Virginia, chapter 483, 1926, uses similarly loose language in a new section added to the tax law which in effect taxes the transfer of all personal and real property *within the state* belonging to persons domiciled without, exception being made in a few cases of bank deposits. Kentucky aligns itself with the other two states by using the phrase *within the jurisdiction*.

It seems that Massachusetts, Virginia and Kentucky have overstepped the holding of the Frick case, for there it was held that property having an actual situs within the state was taxable. It has been held since the earliest days that property in transit[7] or property temporarily[8] within the jurisdiction is not taxable. To save the statutes the courts of the several states will undoubtedly interpret them in accordance with prior holdings on the question of situs.

New York's neighbor, New Jersey, did not legislate quite on the point, but in chapter 294, 1926, went beyond and exempted from the transfer tax, stocks in New Jersey corporations or National Banks located in the state owned by non-resident decedents.

This year will undoubtedly see many changes in the inheritance tax laws of many states. 1927 is a fat year, almost all state legislatures hold sessions, following the lean year of 1926 when only a few legislatures met. The strong feeling and constant agitation on the subject of tax reform is almost certain to result in numerous statutory changes. The time-honored and useful constitutional phrase commonly styled due process had the wholesome effect of settling the unsettled state of the law as to the situs for taxation of tangible property. Will it be of use in the field of taxation of intangibles?

It is the well settled rule that such property is taxable at the domicile of the owner.[9] There are many theories for the taxation of intangibles, but most important is the fact that several kinds of intangibles are taxed many times, for example, where the corporation is created, where a business situs is acquired, and where the owner is domiciled. Thirty-six states impose a transfer tax upon the stock of corporations chartered by them although the stock is owned by a non-resident decedent. Every state which has an inheritance tax, taxes all the intangible property of its resident decedents, under the mobilia rule. Many states impose a tax on intangible property belonging to non-resident decedents when such property is physically located in the state. Eleven states attempted to impose a tax upon the transfer of stock owned by a non-resident decedent if the corporation had property within its borders even though incorporated in another state. This last attempt was too much, and the Supreme Court declared the tax unconstitutional.[10] Sixteen states tax the stock of a non-resident decedent if the certificate of stock happens to be physically located in the state at the time of death, notwithstanding the fact that the corporation issuing the stock is a foreign corporation.[11]

It seems from the foregoing figures that intangibles are taxed in more than one state under one theory or another. Some states adopt several theories in order to get revenue going and coming. There was involved in Frick v. Pennsylvania the question of taxation of intangibles in the form of corporate stocks and bonds. The court did say that as to stocks, "the jurisdiction of the state of domicile was subordinate to the power of the state where the corporation issuing the stocks was chartered." Therefore it could tax on the value of the stocks less the tax paid in the state of incorporation. It might be well to note that the power of the state to tax at all was not in issue; jurisdiction up to a certain amount was conceded, and therefore the court probably could not hold that Pennsylvania had no power at all since some was conceded.[12] A very similar problem occurred in Bullen v. Wisconsin. There the state of domicile taxed the entire amount of intangibles without deduction of the tax levied in the state where the property had acquired a business situs. No error for this holding was assigned in the appeal to the Supreme Court, and it was held that the court need not inquire whether there was any constitutional obstacle to the state of Wisconsin adopting the gross fund disposed of rather than the net amount received as the measure of the tax.

What can constitutionally be done about multiple taxation of intangibles? It seems[13] that constitutionally double taxation is permissible. Mr. Justice Holmes said in the Bullen case: "No doubt it would be a great advantage to the country and to the individual states if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the constitution does not go so far." For similar

7. Illinois Central Railway Co. v. Greene, 244 J. W. 555; Delaware, etc., R. R. Co. v. Pennsylvania, 198 U. S. 341; Union Transit Co. v. Kentucky, 199 U. S. 194; Southern R. R. Co. v. Kentucky, 222 U. S. 63, 68. For a collection of cases see 1 Wharton (3 ed.) 165.

8. Hays v. Pacific Mail S. S. Co., 17 Howard (U. S.) 596; Dominion Steamship Co. v. Virginia, 198 U. S. 299.

9. Intangibles taxable at domicile of creditor, bonds, Bonaparte v. Tax Court, 104 U. S. 592; Constitutionality of power to tax at debtor's domicile questioned in Cleveland P. and A. R. Co. v. Pa., 15 Wall 300; bank deposit in another state, Fidelity and Columbia Trust Co. v. City of Louisville, 245 U. S. 554; shares of stock of foreign corporation, Hawley v. City of Malden, 232 U. S. 1; stocks, bonds, and notes department without, Bullen v. Wisconsin, 240 U. S. 625; fact that intangible personal property is subject to tax when it has a business situs does not preclude taxation in state where owner is domiciled, Fidelity and Columbia Trust Co. v. Louisville, 245 U. S. 54, and cases therein cited; taxable at situs, of corporation, Corry v. Baltimore, 196 U. S. 466; taxable at business situs, for collection of cases see Cooley, 4 ed. volume 2, section 465.

10. Rhode Island Hospital Trust Co. v. Doughton, 70 L. E. 855.

11. For a statement of facts and worthwhile statistics see Report of National Committee on Inheritance Taxation 1925.

12. Bullen v. Wisconsin, 240 U. S. 625.

13. Supra (9).

expression from the same learned Justice see statement in Blackstone v. Miller.[14]

It is possible to consider some forms of intangibles as tangible personal property for the sake of taxation, and indeed there is language in some of the cases to this effect. In New Orleans v. Stempel,[14a] the court said: "It is well settled that bank bills and municipal bonds are in such a concrete tangible form that they are subject to taxation where found, irrespective of the domicile of the owner. . . . Notes and mortgages are of the same nature; and while they may not have become so generally recognized as tangible personal property, yet they have such a concrete form that we see no reason why a state may not declare that if found within its limits they shall be subject to taxation."[14b] Could the rule of the Frick case be applied consistently with the earlier decisions?[15]

While such treatment would settle the dispute as to taxation at the owner's domicile for intangibles evidenced by an instrument in writing and having attributes of tangibles, it would still leave open the question as to simple contract debts which are pure intangibles. Moreover, treating stocks and bonds as tangible would not in any way impair the right of the state where the corporation was chartered to levy a transfer tax.[16] Also as to simple debts, the state where the debtor is domiciled has been held to have the power to tax.[17]

The abuses of multiple taxation are clearly pointed out in the Report of the National Committee for Inheritance Taxation, 1925. The evil exists not only in the excessive tax but frequently in the tremendous economic waste due to delay resulting in depression in the market value of stocks. It is pointed out that often twenty states have formal requirements in the matter of inheritance tax proceedings. The Committee vigorously denounces the present system.[18] and suggests that the state of domicile alone tax intangibles inasmuch as this is the only equitable and practicable rule. The language quite clearly implies that the legal rule is otherwise, and it unquestionably is at the present. As an alternative to those states not wanting to give up the present mode of taxation, the imposition of a flat tax with reciprocal provision is suggested.

The evil involved is essentially that of multiple taxation, and there has been an attempt to meet the evil in two ways, one by a concession made by the Federal government to the states, and the other, and more promising method of reciprocal legislation between the states.

Under the Revenue Act of 1926, the credit allowed on the federal estate tax for the state transfer taxes paid by the same estate was increased from 25 to 80 per cent. The result of this is to eliminate double taxation as between state and nation, to promote uniformity and possibly to prepare the way for turning over the field exclusively to the states.

The real ray of sunshine, however, beams forth from the reciprocal legislation adopted in several states in the past few years. The states feeling the evil most keenly have awakened to the fact that something ought to be done and have adopted a rough and ready but eminently sensible plan of reciprocal exemptions. In 1925 Massachusetts, chapter 338, New York, chapter 143, Pennsylvania No. 391, and Connecticut, chapter 239, all enacted legislation which in substance granted to non-residents exemption from taxation on personal property located within the jurisdiction, if the state of domicile imposes no inheritance tax upon such property of citizens of the first state or has a reciprocal statute.

New York exempts *all personal property* of non-residents who are residents of states which either have no such tax or which exempt all such property of New York residents. Several states, however, exempt part of the personal property of non-residents therefore not giving complete reciprocity. Massachusetts, chapter 148, 1926, exempts only *all intangibles*. Can New York, under her statute, exempt intangibles in New York belonging to estates of Massachusetts residents? The Connecticut act is very interesting. It provides for mutual exemption of "tangible personal property, . . . located in this state . . . if the state of domicile of such decedent imposes no succession, inheritance, transfer or similar tax upon tangible personal property . . . held at their decease by residents of this state." The Frick case will possibly induce the Connecticut legislature to change this law. Connecticut agrees, for example, not to tax the tangible personal property of a Massachusetts decedent if Massachusetts grants reciprocity. Thus under the Frick decision Connecticut cannot levy an inheritance tax on the tangible personal property of the citizen having actual situs in Massachusetts, so that if Massachusetts agrees not to tax such property, it will escape altogether. Practically then, these provisions are to be carefully recast if they are to be effective.

Massachusetts, chapter 148, of the laws of 1926, appreciated the situation and amended its reciprocity agreement to exempt only intangible personal property, thereby assuming control over the tangible personal property having an actual situs within the state over which it was given jurisdiction by the holding in the Frick case.

Reciprocity in an unusual form was adopted in Kentucky, chapter 176, 1926. To get at concealed assets it is provided that the State Tax Commission will furnish information regarding intangibles belonging to non-resident decedents, physically located in Kentucky, to the proper official in the state of domicile if that state supplies like information to the Kentucky authorities.

14. "No doubt this power on the part of two states to taxes on different and more or less inconsistent principles leads to some hardship. It may be regretted, also, that one and the same state should be seen taxing on the one hand according to the fact of power, and on the other, at the same time according to fiction that, in successions after death, Mobilia Sequuntur Personam and domicile governs the whole. But these inconsistencies infringe no rule of constitutional law."

14a. 175 U. S. 309 at 321.

14b. A recent application of this idea occurred in the Appeal of Silberman, 134 Atlantic 778. There the Connecticut Supreme Court of Errors held that United States Bonds, treasury certificates, state and municipal bonds, and cash on hand were tangible for the purpose of a transfer tax and therefore taxable only in the state where an actual situs had been acquired. Consequently, by applying the holding of the Frick case, double taxation was avoided. It will be interesting to see how far the courts will go in calling such property tangible personal property in order to apply the doctrine of the Frick case.

15. Note the practical effect of treating such property as tangibles. It might be possible to evade taxation by sending investment securities to a state where there is no inheritance tax. This would raise the dispute as to whether an actual situs had been acquired, for if not the state of domicile can tax. For a complicated discussion see Buck v. Beach, 206 U. S. 392 and Wheeler v. Sohmer, 233 U. S. 434.

16. Corry v. Baltimore, 196 U. S. 466.

17. Blackstone v. Miller, 188 U. S. 189; Charles E. Carpenter, 31 Harvard Law Review 904.

18. Report of the National Committee on Inheritance Taxation 1925, page 47.

It may be suggested that it is possible to have a Uniform act for the Taxation of Intangibles. That is probably only another way of getting results similar to those obtained by reciprocal legislation. For adjustments by compact see the discussion of the problem in 34 Yale Law Journal[19] in a careful treatment of the possibilities of the compact for taxation as well as many other necessary interstate adjustments. One obvious effect of such a compact would be to remove the exclusive seat of control from any one state. How could it be enforced in case of breach?

19. 34 Yale Law Journal, 685 at 704, Felix Frankfurter and James M. Landis.

Secretary A. W. Mellon is among those who suggest reciprocal action: "There is conflict between the states themselves. It is quite possible under our complex system of property ownership in America for the various states and the Federal Government to take by death taxes more than 100 per cent of a particular estate. The elimination of this manifest injustice will require the working out of some reciprocal exercise of the taxing power by the states and the Federal Government in the interest of the good of the whole. A consideration of this feature might well have the attention of the Congress."[20]

20. 39 Trust Companies 708, December, 1924.

ARRANGEMENTS FOR BUFFALO MEETING

Headquarters

Hotel Statler, Delaware Avenue and Mohawk Street. Rates: Single rooms, $4 to $6 per day; double rooms, $6 to $8 per day; double rooms with twin beds, $6.50 to $12 per day; double room with double and extra bed (for two or three persons), $7 to $8.50 per day; parlor suites, $15 per day up. All rooms have tub and shower bath and outside location.

Reservations and Hotel Information

Requests for reservations and information concerning the Statler and other Buffalo hotels should be addressed to the secretary, William P. MacCracken, Jr., 209 South La Salle Street, Chicago, Ill.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservations, stating (1) whether double or single room is wanted and if double the names of persons who will occupy it; (2) the approximate rate; (3) date of arrival, including definite information as to whether such arrival will be in the morning or evening; (4) whether upper or lower floor is preferred.

Every effort will be made to comply with requests made, as far as available accommodations will permit. Reservations should be made as early as possible.

Reduced Rates for Buffalo Meeting

Summer tourist rates to Buffalo and Niagara Falls will be available to members in certain parts of the country. In those parts where tourist rates are not available, arrangements will be made for securing the usual reduction of 25 per cent on the identification certificate plan, concerning which announcements will appear in subsequent issues of the Journal.

Annual Meeting of Commissioners on Uniform State Laws

THE National Conference of Commissioners on Uniform State Laws will hold its next annual meeting at Buffalo, New York, August 23-29, 1927.

The Headquarters of the Conference will be at the Statler Hotel, and all meetings will be held there.

Requests for hotel reservations should be addressed to William P. MacCracken, Jr., Secretary of the American Bar Association, 209 S. La Salle Street, Chicago, Ill., and reference is made to announcement concerning hotel accommodations which appears in this issue of the Journal.

The following subjects have been tentatively assigned for discussion in the following order:

Real Property Mortgage Act; Public Utilities Act; Incorporation Act; Sale of Securities Act; Trust Receipts Act; Negotiable Instruments Act Amendments; Cooperative Marketing Act; Mechanic's Lien Act; Act for Securing Compulsory Attendance of Non-resident Witnesses.

GEORGE G. BOGERT,
Secretary.

Additional Hotel Accommodations

Hotel	Dist. from Hdq.	With Bath			Without Bath		
		Single	Double	Twin Beds	Single	Double	Suites
Buffalo	5 blocks	$2.50 to $4.50	$4.50 to $6.50	$6.50	.....	$5.00 up	
Lafayette	5 blocks	3.50 to 4.00	5.00 to 6.00	7.00 to $7.50	.....	....	$15.00 up
Broezel	10 blocks	3.00 to 5.00	.....	.....	$2.50 to $4.00	$5.00	
Lenox	11 blocks	4.00 to 6.00	.....	$7.00	2.50	4.00	2 bedrooms
Y. M. C. A. Men's Hotel	1 block	1.00 to 1.50	.....	.....	.....		& 1 bath $7
Touraine	4 blocks	2.50 to 3.00	$5.00 to $6.00	.....	.....	....	$12.00 up
Cheltenham	1½ blocks	2.50	4.00	.....	$1.50	2.50	
Graystone	4 blocks	3.50	4.50	$5.00	.....	....	
Ford	2 blocks	1.50 to 2.50	2.50 to 3.50	.....	.....	....	
Stuyvesant	13 blocks	Furnished apartment $5.00 per day for 2 persons; $8.50 per day for four persons.					
Buffalo Athletic Club	1 block	A limited number of rooms for men are available at $4.50 per day.					

SOME VIEWS ON COMPULSORY AUTOMOBILE INSURANCE

A Real Evil Exists Which Calls for Remedy—Massachusetts Method of Dealing With It Examined—Can Compulsory Feature Be Eliminated and Substantial Justice Still Be Achieved? Suggestion Drawn from Workmen's Compensation Acts—Plan Proposed*

By Edward C. Stone
Member of the Lexington, Mass., Bar

A REAL evil exists when persons injured entirely through the fault of automobilists and thus without any fault upon their own part cannot collect the damages which the law awards them solely because of the financial irresponsibility of the automobile wrongdoer. The inability to pay judgments justly obtained for real injuries, whether to person or property, has in many cases resulted in hardship. "Legal liability without financial responsibility is a barren right to one who sustains injury by the wrongful act of another." (Opinion of the Justices, 251 Mass. 569, at p. 598.)

I am not willing to admit that our Courts have so far broken down that injustice is done to the person sustaining injury by the wrongful act of another when that other can or will pay any judgment awarded. Nor do I believe that the principles for fixing legal liability in the operation of automobiles should as yet give way to an entirely different scheme, to wit: a scheme of compensation for automobile accidents akin to that known as workmen's compensation. I hesitate to recommend that state constitutions be amended with the result that he who has a good case at law shall be deprived of that good case because of a supposed benefit to him who has no case. The Courts have not evolved any series of defences as they did in the old master and servant days—which defences have since become unsuited to later day conditions.

But however this all may be, we shall make a good start when we deal properly with the real evil first referred to. Moreover, furnishing a genuine, workable solution for this real evil may result in minimizing if not in doing away entirely with any fancied injustice as a result of which the new scheme of compensation is suggested. But in any event we should not content ourselves merely with pointing out the difficulties of any situation which works hardships. We should ever be ready and willing to offer constructive suggestions to cure real evils. One very good way of arriving at a genuine solution of any evil is critically to analyze a drastic remedy which has been suggested for that evil.

The Massachusetts Remedy for the Real Evil

In Massachusetts, a law has been passed, effective January 1, 1927, for the avowed purpose of curing the real evil complained of—to wit, the financial irresponsibility of those wholly to blame for automobile accidents causing injury or death. And this law is compulsory in its nature: indeed, it is called the Massachusetts Motor Vehicle Compulsory Security Act.

This law provides in substance that, wholly without regard to whether they are financially responsible or amply protected by automobile liability insurance, all automobile owners whose cars under the law must be registered—there are a few exceptions not necessary now to be noted—(and all *resident* automobile owners are included while only a few *non-resident* owners come within the law)—as a condition precedent to the registration of their automobiles must furnish one of three forms of security: (1) a motor vehicle liability policy, as the law terms it—which is to be supplied by a liability insurance company and which follows in many particulars the ordinary automobile liability policy now issued, with limits of $5/10,000 as respects personal injuries or death; (2) a motor vehicle liability bond executed by a surety company as surety with the same limits; or (3) a deposit of $5,000 in cash or securities.

This method of legal compulsion, it is well to observe, is visited not upon automobile *operators* but automobile *owners*. Moreover, it hits the insured and the uninsured owners alike. And right here it should be called to your attention that in Massachusetts two things are necessary in connection with the lawful operation of automobiles owned in Massachusetts (1) the automobile itself must be registered and (2) the person to operate it, whether owner or otherwise, must be licensed. The Massachusetts law puts no direct legal compulsion upon the operator. It deals only indirectly with him. Perhaps that is all that may be done to the operator. But there is no doubt that legal compulsion is directed against the owner, for he must furnish security in one of the three ways noted before his car may be registered; and under the Massachusetts law, "the presence of an unregistered motor vehicle on the highways has been outlawed and declared a nuisance" (McDonald v. Dundon, 242 Mass. 229, 232.) Since the motor vehicle liability policy or bond provided by the act has what is known in insurance circles as the omnibus coverage, the operator is protected if and when he uses the owner's car with the latter's express or implied consent.

The coverage of this motor vehicle liability policy or bond is not so broad as that now given in the ordinary automobile liability policy. This is because of the limitations which state constitutions put upon the right of legislators to compel

*Address delivered at annual meeting of the Ohio State Bar Association at Cedar Point, Ohio, July 6, 1926.

citizens to do certain things. The Massachusetts Legislature has no extraterritorial authority, and it is at least doubtful if the police power may be so far extended as to compel the furnishing of security as respects accidents upon private property. The result is that the Massachusetts Legislature deemed it wise to provide that the coverage available to injured persons under this compulsory law should be limited to those accidents which occurred within the territorial limits of Massachusetts and upon its public highways.

For injuries received outside of Massachusetts even though caused by cars carrying the compulsory coverage no protection is given. For the reason stated, no such protection could be constitutionally compelled to be given. Those persons who are injured upon private property in Massachusetts, (as, for example, in garages, at gasoline or service stations, in private parking places or in any wise off "the ways of the Commonwealth," by which are generally meant those streets, roads, or highways dedicated to public use) by automobiles carrying the compulsory coverage only have no security to fall back upon for any judgments they secure. The Massachusetts Legislature felt that they lacked the constitutional authority to go to this limit.

Moreover, but few non-residents are required to register their cars in Massachusetts; hence, the great army of out-of-state automobile visitors escape the arm of the compulsory law. It follows that the law in question affords no protection to those persons who are injured by these out-of-state automobiles. And so it follows that the law discriminates against the Massachusetts citizen who owns a motor vehicle—for he must furnish security in one of the three ways indicated while his out-of-the state neighbor or visitor drives on serenely or carelessly, if you will, but in any event without having to furnish security against accidents.

The act provides for the establishment by the Commissioner of Insurance of rates for the motor-vehicle liability policies and bonds. The expense of gathering such statistics as the Commissioner believes valuable in assisting him to arrive at adequate, just, reasonable, and non-discriminatory rates is upon the already overburdened taxpayer. That this business of fixing rates, if done fairly, involves a not inconsiderable expense is evidenced by the fact that already $25,000 have been appropriated in Massachusetts. And it may be interesting to note in passing that the Massachusetts Supreme Judicial Court, in its advisory opinion, said that the law as respects its rating provisions would be constitutional only "if provision is made for a judicial review of the premiums there to be established by the Commissioner of Insurance, and not otherwise" (See Opinion of the Justices, 251 Mass. at p. 611.)

The act further creates a board of appeal upon motor vehicle liability policies and bonds. This board passes upon the question of whether a given liability or surety company is justified in its refusal or declination to issue to a particular person a motor vehicle liability policy or bond. The purpose of this provision is not to leave merely to the insurance or surety company the sole right of determining who of the Massachusetts automobile owners may register their cars. Once again the expense of this tribunal is passed along to the taxpayer.

Some very practical, if only incidental, questions arise. Can the new rates be made lower than existing rates? The Commissioner can only guess at what these new rates will be, at least at first. He has no actual data available to assist him in arriving at a just, a reasonable, or an adequate rate. Such experience as he may ask the existing companies to give him is the experience only of cars already insured. Would anyone doubt that the class of persons now insured would probably furnish a far better experience than would all automobile owners when every single Massachusetts owner must be considered because compelled to take out insurance?

In this connection, too, it must not be forgotten that there will be the feeling at least upon the part of the great majority of the public that, because (as they will suppose) every single person, whether resident or otherwise, is obliged to be insured, everybody sued will be financially good. Law suits must necessarily increase; verdicts will probably increase in size and frequency; at least, more trials will be brought about with the incidental increase of cost to the counties and the state for conducting trials, whether by jury or before the court—a very considerable sum in the aggregate, to be paid ultimately by the overburdened taxpayer.

These same people will undoubtedly believe, because feeling that there is a surely responsible defendant behind every claim for injuries or death, that they should bring suits where now no suit is brought because there is no insurance. The instances where a guest is injured by a host or a relative is injured by another relative are simple illustrations of the point at issue. The fraudulent and the fake claims will certainly not cease to exist.

But, as already observed, these latter considerations, of whatever consequence, may be but necessary evils in arriving at a solution of the general problem, and anyhow they sink into insignificance when one recalls the chief outstanding features of the law.

The law is legally compulsory. Compulsion never has been and never will be popular. A compulsory law is often hard to enforce; at any rate it leads to evasion. A very good and practical illustration of the point here made is found in the constitutional amendment which has to do with prohibiting the manufacture, sale, and transportation of intoxicating liquor. And it must not be overlooked that this compulsion is visited upon the financially responsible man, and upon him who hitherto has seen to it that he was protected by automobile liability insurance. The owner who has already done his full duty to secure protection is treated in precisely the same fashion as his judgment proof neighbor who has been operating without automobile liability insurance and without the ability to pay the damages awarded against him.

Can a Better Remedy Be Suggested?

Now, then, in our search for a better remedy for this evil, let us consider whether some remedy may not be suggested which will do away with this legal compulsion and will still accomplish substantial justice.

Let us approach the matter, then, with the idea of doing away with all actual, legal compul-

sion. Has any similar situation ever faced the legislator seeking a real remedy? There instantly comes to mind the situation which confronted law-makers at the time workmen's compensation acts were first considered.

Under many state constitutions it was believed that a compulsory workmen's compensation act would be unconstitutional. The New York Court of Appeals actually so decided in the Ives case. To obviate this possible objection of unconstitutionality, a certain procedure was suggested, operating as a burden or penalty or incentive or inducement, as a result of which burden, penalty, incentive, or inducement, employers *voluntarily* took out the so-called workmen's compensation policy.

This inducement or incentive voluntarily to take out insurance was accomplished by taking away from employers the three defences which they had in suits brought against them by their employees: (1) contributory negligence; (2) assumption of the risk; and (3) negligence of a fellow servant. The result was that rather than be in the position where the employer would be subject to a law suit with these defences gone, he voluntarily chose to take out a compensation policy. This abolition of defences did not make more cases to be tried in court but worked the other way. The employer chose not to be subject to suits with these defences gone, and *voluntarily* decided to take out a compensation insurance policy, or to bring himself within the provisions of a workmen's compensation act. The incentive or inducement, the burden or penalty, however it may be termed, was the taking away of these defences.

Legal Compulsion to Insure May be Avoided

Now let us search for a similar incentive or inducement to automobile operators as well as automobile owners voluntarily to take out, or to be protected by, automobile liability insurance.

A very forceful inducement or incentive to voluntary action would be to deprive the operator of his right, after an accident for which he was solely to blame, to operate all automobiles unless he put up some security for the consequences of that accident. An equally effective inducement or incentive to voluntary action upon the part of an automobile owner would be to deprive him of the use of his car upon the highways of the State in which the accident occurred if he or any person using his car with his express or implied consent was solely to blame for that accident unless and until the owner put up some security for the results of that accident. As the Massachusetts court said (See Opinion of the Justices, 251 Mass. at p. 598), "the operation of such an instrumentality (referring to the automobile) in public places is not a natural right. It is subject to reasonable regulations for the benefit of the general public."

If we put into effect these suggested burdens, penalties, inducements, or incentives, however one may term them, "for the benefit of the general public," automobile owners and operators are at once placed in the position of either operating so as to avoid all or at least bad accidents or of losing their right to operate and to use their cars "in public places," unless they voluntarily do something to protect the victims of their accidents.

Let us not be too arbitrary in the matter. Let us give automobile operator or owner a preliminary hearing in some form in some court of competent jurisdiction upon the proposition whether he was wholly to blame for the particular accident. If the Court frees him from blame for causing the accident, he continues as before to operate or to use his automobile. If, however, the Court finds him solely to blame for the accident, the Court will take such action as will bring about the result that he cannot continue to operate any automobile or to use the particular automobile concerned in the accident unless and until he puts up such security as the Court orders up to (say) $5,000, the amount of protection usually given in a liability policy to pay any judgment that later may be awarded.

But we will further provide (and here is the most important part of the suggested remedy) that, if he has a liability policy, already issued, with the usual $5/10,000 limits, applicable to the accident in question, the Court shall accept it as adequate security. If, then, the owner has previously, although voluntarily, taken out a policy of automobile liability insurance or if the operator has seen to it, also voluntarily, that he was protected before his accident by a policy of automobile liability insurance, he may still use his own automobile and operate any automobile. Failing to have available such a policy and being otherwise without financial ability to pay judgments, the automobile involved in the accident may no longer be used upon the public highways and the operator may no longer operate any automobile.

The New and Better Remedy Suggested

We will thus provide, if you please, that the operator of every automobile, whether or not the owner, shall either lose his license to operate or be further prevented from operating any automobile, and that the owner of every automobile who either himself uses or permits to be used his own automobile shall either lose his registration of the automobile or be further prevented from using his car upon the public highways, if, as a result of a preliminary hearing, the Court finds the defendant automobile owner or operator (as the case may be) to blame for any automobile accident which may have occurred and if the owner or operator fails to put up such security, up to $5,000, as the court may consider proper to satisfy any judgments later secured. Keep always in mind that an existing liability policy with $5/10,000 limits, taken out before the accident and applicable to it, will always be accepted as adequate security.

The remedy will be put into effect in the following manner. The injured party, after an automobile accident has happened, will have the right to bring a preliminary proceeding in court, either as a part of his action for damages or otherwise. In this preliminary proceeding, the Court will make an inquiry into the facts surrounding the accident. The Court will first determine whether the operator was to blame for the accident, and, if the operator be not the owner, whether the car was being used with the owner's express or implied consent. If the court finds that the operator is to blame or, if the operator be not the owner, that the car was being used with the express or implied consent of the owner, the Court will order that the defendant, whether operator or owner, put up such security

up to (say) $5,000 as to the court seems proper to pay and judgments later awarded.

If the defendant operator fails to put up this security, the Court will report that fact to the State authorities who will in the case of residents thereupon suspend the operator's license until the security shall be put up; and in the case of non-residents the Court will enter an order prohibiting the defendant from further operating automobiles in the state until that security shall be put up. If the defendant be the owner as well as the operator of the automobile or if the defendant owner was not the operator but his car was being used with the owner's express or implied consent, the state authorities, upon notice from the Court, will likewise suspend the registration of the resident's automobile so that that particular car can no longer be used upon the highways until that security shall be put up. If the defendant owner be a non-resident, the same result would be accomplished by a court order.

Incidentally—as already pointed out—and it should be again observed that here is an important provision of the suggested law—the law will provide that the Court shall always accept as adequate security a policy of automobile liability insurance in ordinary form, with the usual $5,000 and $10,000 limits, previously taken out, applicable to the accident in question.

Effect of this "Voluntary" Remedy

The full result of this suggested remedy will be that, before any person, whether owner or otherwise, will operate a car or permit his car to be operated, he will be in this position if he has not already taken out liability insurance: He will have to make up his mind either (1) to be so very careful in operation that (a) no accident will occur, or (b) no accident will occur of such seriousness that he cannot himself put up the necessary security, or (2) he will take out voluntarily, or see that he is protected by, a policy of automobile liability insurance. Otherwise, upon the occurrence of an accident, he will be in the position of losing his license or of not being able to operate any car if merely an operator and, if an owner, he will find himself in the position where he owns a car that may not be used upon the public highway. Here is, therefore, an inducement to safety in that extra precaution would be required or, viewed from the other angle, an inducement before any accident occurred voluntarily to take out a policy of automobile liability insurance.

Advantages of the Suggested Remedy

The immediate advantage of this remedy is that all legal, actual compulsion is taken away. The man still has a choice. Full freedom of action is his. He may do the easy thing and take out an automobile liability insurance policy or he may say to himself, "I am going to be so careful that no accident will happen," or "I am going to be so careful that no serious accident will happen, so serious that I cannot put up security." Thus, he voluntarily chooses (1) to take out automobile liability insurance or (2) to take extra care to avoid at least serious accidents.

Other advantages are also quickly seen: Those who are at present insured will have to do nothing; they go along just as they are now, because their present policies will be sufficient under the law and will be accepted as adequate security in the working out of the law.

The law will apply to everybody, both residents and non-residents. All discrimination against residents is removed at once. The person who comes from out-of-the-state will be attended to by an order of court in the event that he does not have automobile liability insurance or cannot otherwise put up the necessary security, whereas the person within the state, if he does not have a policy or cannot put up the security, will have his license or registration, as the case may be, or both, suspended by the state authorities.

As the policy will be one *voluntarily* taken out, the policy will be the ordinary automobile liability policy now issued which will cover anywhere within the limits of the United States or Canada and thus both within and without the limits of any particular state. It will also extend coverage to accidents occurring upon private property as well as upon the public highways.

I sincerely believe that a remedy of this kind will go far toward accomplishing real results. As already pointed out, those who are already insured will go on as heretofore. With respect to those who are not already insured, the only possible disadvantage is that it will be theoretically possible for them to have one uncompensable accident. The incentive, however, always to be in the position to operate any automobile or at least to use one's own car is so strong that the average person will be certain in some way to protect himself. If it be true that at the present time 80 per cent of all cars operated are purchased upon the installment plan, it is at once obvious that the owners of these cars will be in the insuring class. No person advancing money upon a car will want to take the chance of having thrown back upon him a car which cannot be used upon the public ways. If a person can no longer use his car, he will not be likely to continue his installment payments. The person financing the car will naturally insist that, in addition to the ordinary fire and theft policies, an automobile liability insurance policy be taken out.

We Must Not Overlook the Fundamental, Underlying Evil

We have thus presented a real, genuine remedy in answer to the insistent demand of those who cry out for immediate, specific legislation directed solely to remedy the evil complained of. But it must always be borne in mind that the real, fundamental, underlying evil is not that certain persons who are wholly to blame for injuries occurring to others are financially irresponsible but that serious accidents do occur because of the use of automobiles.

The fundamental, underlying evil, never to be lost sight of, and, therefore, to be corrected is the reduction of the number of accidents, and the continual, perpetual striving for the ideal of preventing all serious accidents. No one realizes more than I the fact it is probably impossible entirely to eradicate automobile accidents particularly upon the public streets of our cities and towns, but in the effort to cure an incidental evil, even though it may be in many instances a very serious and far-reaching one, we should not overlook this real, fundamental, underlying evil, to wit: accidents will

and do happen. If accidents can be entirely prevented, of course, the evil particularly discussed and sought to be remedied will be done away with; but in so far as accidents can be and are reduced, the precise evil complained of can and will be reduced.

It is undoubtedly true, as the so-called Hoover Commission pointed out, that compulsory automobile liability insurance is not a remedy but merely a palliative for the real evil. At all events, such insurance cannot prevent accidents. The remedy here suggested in place of compulsory automobile liability insurance will help in the matter of preventing accidents, as already pointed out. But what every legislator should have continually in mind is, in addition to providing the remedy here set forth or any other solution, to pass every conceivable and reasonable form of law the result of which may be at least to reduce the number of accidents and to attempt the ideal of preventing all accidents. Laws should be passed not only respecting the manner in which and the speed at which automobiles may be operated, but operators should be required to pass examinations before they may receive licenses. Some public authority should have the right under proper circumstances to suspend or revoke licenses to operate and also registrations of automobiles. Laws and regulations should be passed with regard to the mechanical apparatus of automobiles, to see that brakes are proper, that lights are of the right kind.

In addition, there should be a rigid enforcement of all regulations and laws and a ready co-operation between the courts on the one hand and the licensing authorities on the other to help keep down the number of careless and reckless operators. There should be the fullest co-operation between us all, as good citizens, and the police authorities to help bring about the reduction of accidents.

This Whole Matter Is of Vital Importance to Everyone

This whole matter is of vital importance to the people of every community. The treatment of the particular evil complained of should be carefully and earnestly considered from all angles. Particularly should it receive the serious and sober consideration of us all who, as members of an ancient and honorable profession, should be ever ready to see to it that, in the language of the Declaration of Rights of the Massachusetts Constitution, "Every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character." Herein lies a splendid opportunity to put to good purpose the sage counsel of that real progressive whose words are emblazoned on your stationery, "Every man owes some of his time to the upbuilding of the profession to which he belongs." How better may we devote our time and how more properly may we assist in upbuilding our profession than in suggesting constructive remedies for real evils? In the humble but sincere effort of making a genuine contribution to the progressive thought of the times regarding a serious evil this paper has been written and is dedicated to the Ohio Bar Association.

DECISION BY REFEREE

A Plea for More Circumspect Restrictions of This Important Phase of American Jurisprudence —History of System Responsible for Many of Its Limitations—Objections to System—Problems Here Presented Not Applicable to Bankruptcy Referees

By I. MONTEFIORE LEVY
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THE numerous problems incident to the system of referees now in vogue in the United States have not, if we judge from law reviews and law journals, been considered technically for the past half century either by our law schools or the Bar—a fact that is surprising in view of their importance.

The history of the system is itself responsible for many of its limitations, and a brief outline of its origin might throw some light on some of its inefficiencies. In view of the fact that the Constitution of the United States expressly gurantees to each of us the right to a trial by a jury the growth of such an anomalous legal procedure is especially interesting.

The referee practice came into vogue in New York while it was a Dutch colony, and after the conquest by the English it was continued in the investigation of long accounts. Under Dutch practice matters of account were referred to three persons, known as arbitrators, or referees. (Intro. to E. D. Smith's reports XLIV; 2 Rec. of Mayor's Court; Rec. of Mayor's Court, vols. 2 to 7.) In 1683 the Charter of Liberties and Privileges provided that all trials should be by the verdict of twelve men, which virtually abolished this mode of procedure. In the language of the Charter:

> "All tryalls shall be by the verdict of twelve men, and as neer as may be peers or Equalls and of the neighborhood and in the County Shire or Division where the fact shall arise or grow whether the same be by Indictment, Infermacon, Declaracon or otherwise against the Offender or Defendant."

Thereafter actions involving an account were usually tried at common law by an action of account—an intricate proceeding which could not be applied to all cases of account. This led often to a bill in equity for an accounting being had. This means of disposing of

such cases grew in favor, wherein were disregarded earlier decisions that in such a suit "no evidence can be given of an account current." (Gilbert on Evidence, page 192.) Long accounts in such suits led to the consent of both parties, usually, to a reference, and as this expedient grew in favor it became an established practice. (Timpkins vs. Willsheare, 5 Taunt 431.) By 1768 the great inconvenience and dissatisfaction of trying cases of account before juries was widely recognized, and a statute was passed establishing the method of trial before referees. This might be considered the real birth of the system. "An act for the better determination of personal actions depending upon accounts," was the title of the statute of 1768, and it is quite evident that the object was to avoid delay and inconvenience and remove the burden from the jurors of trying long cases. So reads the preamble:

> "Whereas, instead of the ancient action of account, suits are of late for the sake of holding in Bail and to avoid the Wager of the Law, frequently brought in assumpsit whereby the business of unravelling long and intricate accounts most proper for the deliberate examination of auditors, is now cast upon jurors, who at the Bar, are more disadvantageously circumstanced for such services; and this burden upon jurors is greatly increased—upon long accounts, are exposed to erroneous decisions, and jurors perplexed—and other causes are delayed and the general course of justice greatly obstructed."

This act of 1768 was declared by the Court of Appeals virtually a part of the Constitution of 1777 so far as it related to the power of referring actions at law, (Steck vs. Colorado, 142 N. Y. 236) and while by its own limitations this act had expired January 1, 1771, it was continued by legislation until 1780. Laws were passed by various statutes of March 30, 1801, April 5, 1813, and amendments made in 1845 and 1848, the one in the latter year limiting the jurisdiction of referees by excluding cases involving difficult questions of law. The law as it is today is virtually as passed in 1877 when the Code of Civil Procedure specified the rights to a refereeship in given cases. Attempts made in the latter part of the nineteenth century for other statutory enactments on the subject failed.

Reference by consent involves no particular problem and need not be considered here. Mutual desire on the part of parties in controversy to have recourse to a referee involves no hardship to either party. We are here interested, therefore, in compulsory references as now instituted. These references, too, are based upon statutory provisions. The Federal Constitution provides that "In suits at common law where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved." No Federal statutory provision providing for compulsory references would be construed as constitutional, and for that reason compulsory references are not in vogue in Federal courts. (Field v. Schell, 4 Blach f 435; Howe v. Edwards, 15 Blach f. 402; and U. S. v. Rathbone, 2 Paine (U. S.) 578; Bank of Hamilton v. Dudley's Lessee, Peters 492.) In New York State, however, compulsory references are permissible by statute, and this statute has been held constitutional (Camp v. Ingersoll, 86 N. Y. 433), and the constitutionality of compulsory references in this State has been sustained. (Steck v. Colorado, 142 N. Y. 236; Allentown v. Dwyer, 26 A. D. 101.) The courts have held that there need not be statutory references in equitable actions and notwithstanding the absence of any constitutional provisions the courts have the right to order a reference in an action of an equitable nature. (Camp v. Ingersoll, *supra.)*

While most of the States guarantee by their constitutions the right to trial by jury, nevertheless in some of these States compulsory references are allowed. Such States, however, justify such leniency in this regard by pointing to the fact that prior to the adoption of their constitution compulsory references had been granted, and they hold by inference to the assumption that the constitutional provision regarding trial by jury simply continues the original status of referees, since it does not expressly forbid them nor take away from the court the right existing prior to the constitution to order a reference.

The question arises, what are the objections to the references? Perhaps one answer can be found in a comment which appeared as long ago as 1880 in the Solicitor's Journal and Reporter (Vol. 24, page 685):

> "Some judges do undoubtedly insist on references on somewhat insufficient grounds and we are not sure that it would not be really quite as likely in many cases that are referred that justice would be arrived at by the verdict of a jury as by the award of an arbitrator. Referring is often a tempting way of getting rid of an uninteresting and troublesome case."

It has been jocosely narrated how a judge at the assizes, hearing counsel incautiously say that some point in his client's case was as clear as two and two make four, immediately said that if the case involved figures it had better be referred.

Protracted and laborious inquiry into many uninteresting details involving figures is not pleasant and the existing system of references, established in common law practice before the Judicature Act, affords an avenue of escape from the tedium of such inquiries. There is justification, of course, in jury cases where an action involves a very long account and the items are too numerous to be retained in the minds of the jury (who keep no minutes of the evidence), but the designation, "long account," is variable. Much has been said and written on "what is a long account." The best criterion might be said to be the one above stated —as it affects the jury. In the case of Magown v. Sinclair, 5 Daly 63, Justice Daley summarized this question as follows:

> "This is not a case for a reference. To authorize a compulsory reference, the account must not only be a long one but must be directly involved. It must be the immediate object of the suit or the ground of the defense, and not arise collaterally or incidentally."

This was held by the Court of Appeals in Kain v. Delano, 11 Ab. Pr. N. S. 29.

On the other hand, in a proper case for a compulsory reference there must be no difficult question of law for the referee to determine. (Dane v. Liverpool, 21 Hun. 259.) Though it is discretionary with the trial court to order a compulsory reference, the trial court cannot, for instance, declare that a case involves a long account when such is not the case. He cannot be arbitrary. He is subject to precedent. *(Discretio est discernere per legem quid sit justum.)* It is obvious that if the trial judge could order a compulsory reference in his discretion, the result would be that the right to trial by jury would not be inviolate and would be at the mercy of a judicial officer. Coke says, "the courts will not allow mere caprice to be dignified with the title of the exercise of judicial discretion."

As a rule, compulsory reference will not be ordered in actions involving attorney's fees, unless the accounts are necessarily involved.

An example of the danger of referring such an action, and as far as that is concerned, any action, is a recent decision appearing in the New York Law Journal (Vol. 74, number 41,) Griswold v. Harron, et al.

involving the value of an attorney's services, referred for determination to a referee. Mr. Justice Kelly, writing for the Appellate Division, 2nd Department, said:

> "The hearing before the referee upon a comparatively simple issue resulted in a contest between the attorney and his former clients, aided by the plaintiffs, whose actions had been dismissed, which takes up six hundred printed pages. The referee finally reported that the attorney was entitled to an additional payment of $2,500, but the referee presented a bill for $1,200 and a stenographer's bill for $300. The attorney was obligated to pay these amounts in order to take up the report . . ." "Despite their vigorous contest of the attorney's claim before the referee, and their insistence that nothing was due him, the defendants on the last motion (to confirm referee's report) were willing to pay the attorney the $2,500 found due by the referee, but refused to pay the referee's bill and the expenses of the referee."

This brings us to the main question—the hardships and injustices incident to too liberal practice in the appointment of referees. The stenographic record made in court is at the expense of the State, but the expense of stenographic records made at the references is borne by the litigants. Judges are paid by the State; referees by the litigants. Often the inability of one side to take up the report may be a factor in a decision. This is contrary to the fundamental theory of our government, which is to make justice equally available to all. The State provides and maintains court accommodations to prevent any inequality of rich and poor before the law. Almost fifty years ago the Central Law Journal in editorial comment (September 28, 1877, Vol. 5, page 275), stated:

> "The referee system is undoubtedly liable to abuse on account of excessive fees, but its greater danger lies in another direction. A referee sometimes finds himself unconsciously *sitting as a judge in his own case*. His fees are to be taxed and collected as costs in the suit.
>
> "Suppose, then, that the plaintiff is solvent and the defendant insolvent. He is under a direct temptation to decide in favor of the latter, knowing that if the judgment goes against the insolvent party, he, the referee, will lose all compensation for his services.
>
> "It may be said that it is a low view to take of the morals of the legal profession to suppose that any lawyer would be influenced by such considerations. But human nature is weak at best and ought not to be subjected to such temptations. No officer who is called upon to act judicially should receive a fee dependent upon the event of the litigations."

In New York State the provision for reference fees is as follows: (Section 1545 of the Civil Practice Act.)

> "A referee is entitled to ten dollars for each day unless at or before the commencement of the trial or hearing a different rate of compensation is fixed by the consent of the parties."

Perhaps if the discretionary fixing of the rate by consent were abolished, references would soon lose in popularity and would really be made only in imperative cases. Now, only too often the referee at the opening of the first hearing, inquires about the matter of his fees and seeks a stipulation between the parties as to the amount he should receive. The subject thus presented makes a litigant reluctant to take the position that the referee shall receive only the statutory fee of $10 a day and he usually submits himself to stipulating to pay the referee a larger amount.

Some system should be feasible whereby a stipulated number of referees or masters could be appointed upon an annual salary, specifically for the purpose of cooperating with the Court and responding to it in all of the matters now comprehended within the appointment of private referees at the expense of the litigants. Such a procedure would cast the burden and the expense upon the State where it rightfully belongs. The appointment of masters has been urged by many prominent members of the Bar, usually for the purpose of inaugurating a practice similar to that existing in the English courts. Such officers of the law would provide the courts with every facility they now have in the appointment of referees and would eliminate for the litigants the injustice sometimes attendant upon compulsory referees.

The solution suggested by the writer was proposed more than fifty years ago. In 1872 a bill was introduced in the New York legislature, providing that the government appoint, subject to the confirmation of the Senate, twenty persons residing in the City of New York, to act as legal referees. A similar bill was introduced several years later, but met with defeat. Such a bill should be introduced again with additional provision for adequate compensation, a most important factor, and also with a provision making it a serious offense to ask or receive more than the legal fees.

The great danger in the referee system lies in the distrust that it tends to create in the judicial branch of the government. A citizen should be permitted to present his claim before the court without being compelled to bear the expense and burden of presenting part or all of the testimony before a man other than a judge of the Court, or to pay the expense of the stenographic record, or be annoyed by adjournments which may be taken when a matter appears before a referee.

It is important to state at this point that the problems presented by the references are not applicable to the referees in bankruptcy. They were created by the Bankruptcy Act of 1898, corresponding to the office of the Registry under the Bankruptcy Act of 1867.

The Albany Law Journal made a statement in 1871 that is equally true today: "We do not see, however, that we can better matters by dispensing with references, as the present judicial force is not large enough to dispose of all the business coming before the court." (Editorial of November 25, 1871, Vol. 4, page 282.) The courts today are overcrowded. Litigants have to wait several years in our Supreme Court before they can have their claim adjudicated. In the meantime, the defendant's financial responsibility may change, and whereas a judgment would be of value at the time the claim is made and the summons and complaint are served, yet, after having waited over two years, when the plaintiff finally gets his day in Court, and at great cost procures a judgment against the defendant, then to his great dismay he learns that the judgment is uncollectible. This is a tragic state of affairs, challenging our whole structure of government. The debtor refuses to pay his claim, but postpones it two or three years, seeing a way of delaying the disbursement of the money, in the meantime using that money to his own advantage and in other directions, perhaps with a thought that, after vexatious litigation and delay the plaintiff may come around and be willing to accept a much smaller amount in order to get some immediate cash. Such a condition should be removed at the earliest possible time. The proposed legislation of 1872, referred to above, should be reintroduced for favorable action. But in any event references should be discouraged and authorized only in exceptional and unusual situations and then only until the trial calendars are cleared.

The one thing which convincingly suggests itself after a review of the referee system is that it is decidedly defective, undemocratic and unjust.

REVIEW OF RECENT SUPREME COURT DECISIONS

Acquittal Under Sec. 21 of Prohibition Act No Bar to Proceeding in Equity Under Sec. 22 to Enjoin Nuisance—Use of Mails to Obtain Money by Threats of Violence Does Not Violate Statute Against Using Same for Fraudulent Purposes—Reversible Error for Judge to Recall Disagreeing Trial Jury and Ask How It Is Numerically Divided—Effect of Plea of Nolo Contendere—Right of Review on Constitutional Grounds Must Be Supported by Substantial Questions

By Edgar B. Tolman

Criminal Law—Additional Penalty—Res Judicata

Acquittal under Sec. 21 of the Prohibition Act defining any place where liquor is manufactured to be a nuisance and making its maintenance a misdemeanor is no bar to a proceeding in equity under Sec. 22 to enjoin such nuisance.

Murphy v. United States, Adv. Ops. 255; Sup. Ct. Rep. v. 47, 218.

The defendants, Thomas and Vincent, were tried for maintaining a nuisance under § 21 Title III of the Prohibition Act and were acquitted. Later a suit in equity was instituted by the government to abate the same alleged nuisance under § 22 of the act. The defendants proved their prior acquittal and moved that the bill be dismissed. Their motion was denied and a decree entered abating the nuisance and closing the premises for a year. The defendants appealed and the question was certified to the Supreme Court to determine whether the acquittal under §21 was a bar.

Under § 21 any room, house, or place where intoxicants are manufactured, sold or kept contrary to law is a nuisance and the maintenance of it is made a misdemeanor punishable by fine, imprisonment or both. Under § 22 a suit can be brought to enjoin the nuisance as defined.

The appellants contended that § 22 imposes an additional penalty to those imposed by § 21 and that since they have been acquitted of the crime they cannot be punished for it in a subsequent proceeding.

The court rejected this contention in an opinion delivered by Mr. Justice Holmes. The ruling resulted from a determination of the purpose of the statute:

> The only question is what the twenty-second section is intended to accomplish. It appears to us that the purpose is prevention, not a second punishment that could not be inflicted after acquittal from the first. This seems to us to be shown by the whole scope of the section as well as by the unreasonableness of interpreting it as intended to accomplish a plainly unconstitutional result. . . .
>
> If we are right as to the purpose of §22 the decree in the present case did not impose a punishment for the crime from which the appellants were acquitted by the former judgment. That it did impose a punishment is the only ground on which the former judgment would be a bar. For although the parties to the two cases are the same, the judgment in the criminal cases does not make the issues in the present one res judicata, as is sufficiently explained in Stone v. United States, and Chantangco v. Abaroa. The Government may have failed to prove the appellants guilty and yet may have been and may be able to prove that a nuisance exists in the place.

Mrs. Mabel Walker Willebrandt argued for the United States and Messrs. Murphy pro se.

Criminal Law—Conspiracy to Defraud—Threats and Intimidation

Use of the mails for obtaining money by means of threats of murder and violence is not in violation of the statute forbidding the use of the mails to obtain money by fraud.

Fasulo v. United States, Adv. Ops. 232; Sup. Ct. Rep. v. 47, 200.

The Criminal Code in §215 provides that "whoever, having devised . . . any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representation, or promises . . . shall, for the purpose of executing such scheme . . . place, or cause to be placed, any letter . . . in any post-office . . . to be sent or delivered" . . . shall be punished. The defendant was convicted of conspiracy to violate this statute.

The question raised in the case was whether the defendant had acted in violation of this provision in sending a letter for the purpose of obtaining money by threats of murder or bodily harm. The United States contended that threats constitute fraud, broadly speaking, and that the section covers the obtaining of money from another by dishonest means. The defendant urged that the letters were not sent in an attempt to secure money by fraud, but rather by coercion.

The conviction was reversed on the ground that the act strictly construed under the principles governing the interpretation of criminal statutes, did not cover cases of coercion. Mr. Justice Butler delivered the opinion of the court and briefly assigned the reasons for the decision. He did not deny that securing money by coercion was more reprehensible than cheat, trick or false pretense, but argued that such fact could not justify the extension of the statute beyond its meaning as strictly construed.

Turning to the facts of this case the learned Justice said:

> If threats to kill or injure unless money is forthcoming do not constitute a scheme to defraud within the statute, there is none in this case. The only means employed by petitioner and his co-conspirators to obtain the money demanded was the coercion of fear. A comprehensive definition of "scheme or artifice to defraud" need not be undertaken. The phrase is a broad one and extends to a great variety of transactions. But broad as are the words "to defraud," they do not include threat and coercion through fear or force. The rule laid down in the Horman case includes every scheme that in its necessary consequences is calculated to injure another or to deprive him

of his property wrongfully. That statement goes beyond the meaning that justly may be attributed to the language used. The purpose of the conspirators was to compel action in accordance with their demand. The attempt was by intimidation and not by anything in the nature of deceit or fraud as known to the law or as generally understood. The words of the Act suggest no intention to include the obtaining of money by threats. There are no constructive offenses; and, before one can be punished, it must be shown that his case is plainly within the statute.

The opinion was concluded by pointing out that the court has repeatedly ruled that though statutes should be construed with reference to the evils they were designed to prevent, nevertheless:

> This rule does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress.
>
> The threats in question cannot fairly be held to constitute a scheme to defraud.

Mr. John O'Gara argued the case for the petitioner and Mr. William J. Donovan for the United States.

Criminal Law—Nature of Plea in Abatement

A plea in abatement to an indictment alleging the presence of unauthorized persons in the grand jury room is not a special plea in bar within the meaning of the Criminal Appeals Act, although the Statute of Limitations has run, and no appeal lies.

United States v. Storrs, Adv. Ops. 266; Sup. Ct. Rep. v. 47, 221.

The defendants were indicted for conspiracy to violate and for violation of §215 of the Criminal Code by using the mails for executing a fraudulent scheme. They filed a plea in abatement alleging that while the grand jury was investigating the case a court stenographer was present as well as the district attorney who summarized the evidence and advised that an indictment if any should be found must be against all the defendants. The trial court sustained the plea on demurrer and abated the action. The record certified that the statute of limitations had run and that further prosecution would be barred by this ruling of the court. The government sued out a writ of error on the ground that under the circumstances the plea amounted to a "special plea in bar" under the Criminal Appeals Act.

The Supreme Court ruled that this plea was one in abatement and that the fact that the statute of limitations had run could not alter its nature. Mr. Justice Holmes in delivering the opinion said:

> It is true that there is less strictness now in dealing with a plea in abatement than there was a hundred years ago. The question is less what it is called than what it is. But while the quality of an act depends upon its circumstances the quality of the plea depends upon its contents. As was said at the argument, it cannot be that a plea filed a week earlier is what it purports to be, and in its character is, but a week later becomes a plea in bar because of the extrinsic circumstances that the statute of limitations has run. The plea looks only to abating the indictment not to barring the action. It has no greater effect in any circumstances. If another indictment cannot be brought, that is not because of the judgment on the plea, but is an independent result of a fact having no relation to the plea and working equally whether there was a previous indictment or not. The statute uses technical words, "a special plea in bar" and we see no reason for not taking them in their technical sense. This plea is not a plea in bar and the statute does not cover the case.

Mr. William J. Donovan argued the case for the government and Messrs. Dan B. Shields and Albert R. Barns for the defendants.

Criminal Law—Practice

It is reversible error for a trial court to recall a jury which has disagreed for some time and inquire of it how it is numerically divided.

Brasefield et al v. United States, Adv. Ops. 136, Sup. Ct. Rep. v. 47, 135.

The petitioners here were convicted of conspiracy to possess and transport intoxicants in violation of the Prohibition Act. After an affirmance by the Circuit Court of Appeals the case was brought before the Supreme Court on writ of certiorari.

The jury had failed to agree after some hours of deliberation when the judge recalled it and made the inquiry complained of. The foreman informed him that it stood nine to three, but gave no indication which number favored conviction.

The petitioners contended that this conduct of the trial judge constituted reversible error under the rule pronounced in Burton v. United States. The respondent urged on the contrary that that rule was merely hortatory and non-compliance with it was not reversible error.

The Supreme Court, however, reversed the conviction, thus holding the rule to be mandatory in a brief opinion written by Mr. Justice Stone. The gist of the case is thus expressed:

> We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. Such a practice which is never useful and is generally harmful is not to be sanctioned.

Mr. John W. Preston argued the case for the petitioner and Mr. William J. Donovan for the respondent.

Criminal Law—Plea of Nolo Contendere—Effect of

A court in accepting a plea of nolo contendere is not thereby rendered powerless to impose a sentence of imprisonment.

Hudson et al v. United States, Adv. Ops. 137; Sup. Ct. Rep. v. 47, 127.

The petitioners were indicted in the federal court for conspiracy to use and for using the mails for purposes of defrauding, which were offenses punishable by fine or imprisonment or both. They entered pleas of *nolo contendere* but were sentenced to imprisonment for one year and a day. The conviction and sentence having been affirmed the case was taken to the Supreme Court on certiorari.

The petitioners urged that the plea is conditioned on the imposition of a penalty lighter than imprisonment and that by accepting such a plea a court was thereafter without power to impose a prison sentence.

In the Supreme Court the contention of the petitioners was rejected and the rulings of the lower

courts affirmed in an opinion delivered by Mr. Justice Stone. This case thereby overrules Tucker v. United States and other cases in the Seventh Circuit so far as they lend support to opposite view.

The learned Justice carefully examined the supposed authority on which the Tucker case rests and concluded that the early cases and texts were in no way decisive as to the effect of the plea except that it did not estop the defendant from thereafter pleading not guilty, as was the effect of a plea of guilty.

The opinion concluded its review of the authorities with the statement that:

> There is no suggestion that would warrant the conclusion that a court, by the mere acceptance of the plea of *nolo contendere*, would be limited to a fine in fixing sentence. . . .
>
> We think it clear, therefore, that the contention now pressed upon us not only fails of support in judicial decisions other than those of the seventh circuit already noticed, but its historical background is too meager and inconclusive to be persuasive in leading us to adopt the limitation as one recognized by the common law. . . .
>
> Undoubtedly a court may, in its discretion, mitigate the punishment on a plea of *nolo contendere* and feel constrained to do so whenever the plea is accepted with the understanding that only a fine is to be imposed. But such a restriction made mandatory upon the court by positive rule of law would only hamper its discretion and curtail the utility of the plea.

The case was argued by Mr. B. B. McGinnis for the petitioners and Mr. Charles Bunn for the respondent.

Criminal Law—Practice

A right of review on grounds of constitutionality must be supported by substantial questions and will not be seriously considered if based on grounds that are frivolous or settled by prior decisions. Constitutional guaranties to defendants in criminal cases are embodiments of common law principles and will not be expanded ordinarily beyond their common-law scope.

Salinger v. United States, Adv. Op. 204; Sup. Ct. Rep. v. 47, 173.

In this cause the defendant was indicted and convicted in the United States District Court for South Dakota of using the mail to carry out a scheme to defraud. He appealed to the Supreme Court by drect appeal on the ground that his constitutional rights had been invaded. The basis of the defendant's contentions was:

(1) That the conviction in South Dakota was in violation of the constitutional provision, entitling the accused to trial in the State and district where the alleged crime was committed, because,

(a) the indictment definitely charged the crime as having been committed in Iowa,

(b) if not in Iowa, then it was uncertain for failure to show one district or another,

(c) there was no evidence that the place was in South Dakota.

(2) The charge was indefinite and ambiguous so that the constitutional right to be informed of the nature of the charge was denied.

(3) Hearsay evidence was admitted over objection in violation of the defendant's right to be confronted by adverse witnesses.

(4) The right to be tried only on an indictment by a grand jury was violated in that the trial court withdrew part of the charge and allowed the jury to convict on the remaining part.

The court in an opinion written by Mr. Justice Stone first stated the law with respect to appeals on grounds of constitutional violations. The learned Justice stated that:

> The statutes which define and distribute federal appellate jurisdiction and make the existence of a constitutional question the test of the right to a review, as also the court in which the review may be had, always have been construed as referring to a question having sufficient substance to deserve serious consideration, and not one which is so devoid of merit as to be fanciful or frivolous, or which is not open to discussion because settled by prior decisions.

Then in view of this rule the Court tested the various contentions of the defendant, and having found them all without merit affirmed the decision of the lower court.

The first contention, that the conviction was in the wrong district, was found to be unsupported, because of the delivery of the letter to the victim in South Dakota, as was intended by the defendant. The Court pointed out that putting the letter into the mail box in Iowa did not constitute commission of the offense in Iowa. On this point the Court said:

> It is very plain that the offense charged was causing the letter to be delivered by mail in South Dakota in furtherance of the scheme, and that the proper place of trial was in the District of South Dakota, where the delivery was effected as intended. We so held in a proceeding where Salinger was resisting removal to that district for trial on this indictment. The question hardly was debatable then, and certainly has not been an open one since. The assertion that there was no evidence of the commission of the offense in that district amounts to no more than saying that the offense charged was not proved, and therefore that a verdict of acquittal should have been directed. But it has no bearing on the district in which the offense charged was to be tried.

The second contention was summarily dismissed without discussion.

The third contention, that hearsay was unconstitutionally admitted in evidence, was also rejected with a brief comment. The learned Justice took care to show that prejudice to the defendant was avoided in large measure by an instruction to the jury to disregard evidence that was not traced back to the defendant personally. The other evidence was properly held admissible on the ground that, though not admissible by itself alone, it was shown to be in such relation to the defendant as to be more than mere heresay, and consequently receivable. The right of confrontation was explained with the statement that:

> The right of confrontation did not originate with the provision in the Sixth Amendment, but was a common-law right having recognized exceptions. The purpose of that provision, this Court often has said, is to continue and preserve that right, and not to broaden it or disturb the exceptions. The present contention attributes to the right a much broader scope than it had at common law, and could not be sustained without departing from the construction put on the constitutional provision in the cases just cited.

The fourth and last contention was shown likewise to be without merit under the circumstances of this case. Various counts in the indictment were withdrawn at the request of the defendant, because unsupported by evidence. The remaining part was left just as returned by the grand jury, and consequently could not be said to have been amended. In the language of the opinion,

> It did not work an amendment of the indictment and was not even remotely an infraction of the constitutional provision that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury."

The case was argued by Messrs. Benjamin I. Salinger and Arthur F. Mullen for the plaintiff in

error, and Mr. Alfred A. Wheat for the defendant in error.

Criminal Law—Practice

A court may acquire jurisdiction of a defendant by false arrest and a defect in a warrant that it is not supported by properly verified affidavits cannot be availed of by motion to quash after properly verified affidavits are filed by leave of court.

Albrecht v. United States, Adv. Ops. 333; Sup. Ct. Rep., Vol. 47, 250.

Albrecht and his associates were sentenced upon each of nine counts which charged violations of the Prohibition Act. Under the Judicial Code as then in force a direct appeal from the judgment of conviction was taken chiefly on the grounds that the lower court obtained no jurisdiction because of defects in the information and affidavits and that the Fourth Amendment had been violated.

The information recited that it was filed with leave of court by a United States Attorney. A bench warrant then issued and the defendants were arrested. On being brought into court they filed bonds to appear and answer and were dismissed from custody. At that time they made no objection to either jurisdiction or service by execution of the warrant; nor did they indicate any intention to appear specially. Later the accused filed a motion to quash the information and appeared specially for this purpose only. The ground stated for this motion was lack of jurisdiction of the court because the information was unverified and because the affidavits attached were not sworn to before federal officers. The defect in verification relied upon was that it recited merely that the federal attorney gave "the court to understand and be informed on the affidavits" of two named persons.

By leave of court the affidavits were promptly sworn before the proper federal official, the clerk of the court, and additional affidavits duly sworn were filed. Then the defendants filed another motion to quash, this time directing their motion to both information and warrant. This motion was also denied and a demurrer based on similar grounds was overruled. On plea of not guilty the defendants were convicted, and a motion in arrest of judgment was denied.

In the Supreme Court the judgment was affirmed for the reasons assigned by Mr. Justice Brandeis. It was conceded in the opinion that the arrest was illegal because the affidavits on which it issued were not properly verified. But the court stated that this did not render the information void, and pointed out that jurisdiction of the person can sometimes be obtained otherwise than by lawful arrest, because:

> The invalidity of the warrant is not comparable to the invalidity of an indictment. A person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the court. But a false arrest does not necessarily deprive the court of jurisdiction of the proceedings in which it was made. Where there was an appropriate accusation either by indictment or information, a court may acquire jurisdiction over the person of the defendant by his voluntary appearance. That a defendant may be brought before the court by a summons, without an arrest, is shown by the practice in prosecutions against corporations which are necessarily commenced by a summons. Here, the court had jurisdiction of the subject matter; and the persons named as defendants were within its territorial jurisdiction. The judgment assailed would clearly have been good, if the objection had not been taken until after the verdict. This shows that the irregularity in the warrant was of such a character that it could be waived.

The question next raised in disposing of the case was whether the irregularity in the warrant was waived and if not whether it had been cured. The first of the questions was answered in the negative, that there was no waiver of the defect by reason of the failure of the defendants to object at the time of filing their bonds. It was conceded that even thereafter a motion to quash the warrant would have been in order. The difficulty however was not in waiving the defect, but in allowing it to be cured before taking advantage of it. This error was fatal to the defendants because:

> The first motion to quash was not directed to the invalidity of the warrant. As that motion to quash was directed solely to the information, it could not raise the question of the validity of the warrant. The motion to quash the warrant was not made until after the government had filed properly verified affidavits by leave of court. Thereby the situation had been changed. The affidavits then on file would have supported a new warrant, which, if issued, would plainly have validated the proceedings thenceforward. There was no occasion to apply for a new warrant, because the defendants were already in court. The defect in the proceeding by which they had been brought into court had been cured. By failing to move to quash the warrant before the defect had been cured, the defendants lost their right to object. It is thus unnecessary to decide whether it would have been proper to allow the amendment, and deny the motion to quash, if the attack on the warrant had been made before the amendment of the affidavits.

A further contention urged by the defendants was that the Fifth Amendment was violated here by the imposition of double punishment. This was based on the fact that the information charged illegal sale and possession of liquor as well as maintaining a nuisance, and that the liquor in each case was the same. This contention was briefly disposed of with the comment that:

> Possessing and selling are distinct offenses. One may obviously possess without selling; and one may sell and cause to be delivered a thing of which he has never had possession; or one may have possession and later sell, as appears to have been done in this case. The fact that the person sells the liquor which he possessed does not render the possession and the sale necessarily a single offense. There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction. The precise question does not appear to have been discussed in either this or a lower federal court in connection with the National Prohibition Act; but the general principle is well established.

Mr. Charles A. Houts argued the case for the plaintiffs in error and Solicitor General Mitchell for the United States.

Criminal Law—Evidence

The illegal destruction of liquor found on premises by revenue agents acting under a search warrant does not render inadmissible in evidence samples retained by them.

McGuire v. United States, Adv. Ops. 292; Sup. Ct. Rep. Vol. 47, 259.

The defendant in the trial court was convicted of the crime of possessing intoxicating liquor contrary to the Prohibition Act. This judgment was reviewed by the Circuit Court of Appeals which certified to the Supreme Court two questions which it regarded as of controlling importance. The certificate set out that before the information was filed a search warrant was issued to certain revenue agents directing them to enter and search the premises where the defendant was alleged to be in possession of liquor. The officers entered and found several gallons of intoxicants and, without a court order or other legal authority, destroyed all the liquor found except one quart of whiskey and one of alcohol which they kept as evidence. At the

trial that which had been retained was introduced in evidence over objection of the defendant. The ground of the objection was that the other liquor having been destroyed without legal authority rendered the whole seizure illegal so that admission of the evidence was in violation of the Fourth Amendment. On the basis of this state of facts the questions certified were:

> 1st: Were the officers of the law by reason of their action in destroying the liquors seized trespassers *ab initio?*
>
> If the answer to the first question is in the affirmative, we ask
>
> 2nd: Was the admission in evidence of the samples of liquor unlawful?

The theory of the defendants' position was that the destruction of the other liquor, which was conceded to be unlawful rendered the whole proceeding illegal so that the government agents were trespassers *ab initio*, and consequently that the liquor which was saved was inadmissible by reason of its wrongful seizure.

In an opinion delivered by Mr. Justice Stone the court held that the evidence was rightly admitted. He summarized the history of the doctrine of trespass *ab initio* from its origin in the six Carpenters case, pointing out that it was a fiction which had been applied to civil cases only, and whose extension was not favored.

In the course of the opinion the learned Justice said:

> Even if the officers were liable as trespassers *ab initio*, which we do not decide, we are concerned here not with their liability but with the interest of the Government in securing the benefit of the evidence seized, so far as may be possible without sacrifice of the immunities guaranteed by the Fourth and Fifth Amendments. A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule. The use by prosecuting officers of evidence illegally acquired by others does not necessarily violate the Constitution nor affect its admissibility. The Fourth and Fifth Amendments protect every person from the invasion of his home by federal officials without a lawful warrant and from incrimination by evidence procured as a result of the invasion. Here there was no such invasion. The seizure of the liquor received in evidence was in fact distinct from the destruction of the rest. Its validity so far as the government is concerned should be equally distinct. We can impute to the one the illegality of the other only by resorting to a fiction whose origin, history, and purpose do not justify its application where the right of the government to make use of evidence is involved.

The opinion was concluded by pointing out that the view of the case taken by the court required no answer to the first question certified, which consequently was left unanswered. The case was argued by Mr. Ransom H. Gillett for McGuire and by Mr. Alfred A. Wheat for the government.

Satisfactory Binder for Journal

On page 119 of this issue will be found an announcement concerning what we regard as a satisfactory binder for the Journal. We suggest that those who are interested in preserving their current issues turn to it and secure further details.

How to Secure Drafts of Restatements of Law

THE fact that 18,467 copies of the tentative drafts of the Restatement of the Law already issued by the American Law Institute were sold from May 1 to Nov. 16, 1926, shows to what an extent the Bar is manifesting its interest in the enterprise. Most of these were sold as a result of the co-operation of the Secretaries of various Bar Associations, but any member of the Bar who is interested may secure copies at a merely nominal price by sending an order to the American Law Institute, 3400 Chestnut St., Philadelphia, Penn. The Restatements have gotten far enough along to be not only of general interest but of service. Comment and criticism on the drafts are welcomed by the Institute. For the convenience of members of the Bar, and in the hope of aiding in the widest possible distribution of the tentative drafts, we print the following list of the drafts issued to date, the subjects covered and the price of each:

Conflict of Laws Restatement No. 1—Domicil, Sections 10 to 42 inclusive. .50 a copy.

Contracts Restatement No. 1—Including Meaning of Terms; General Principles in the Formation of Contracts; Expression of Assent in the Formation of Informal Contracts, Sections 1 to 72 inclusive. .40 a copy.

Torts Restatement No. 1—Conduct Intentionally Violating the Rights of Personality (Assault, Battery and False Imprisonment) and Consent Thereto, Sections 1 to 77 inclusive. .40 a copy.

Agency Restatement No. 1 covering the first five chapters, namely, Definitions and Distinctions, Acts for Which Agency May be Created, Competency of Parties, Appointments of Agents and Servants and the Evidence Thereof, Appointment of Agents by Other Agents, and the Delegation of Authority, Ratification. .90 a copy.

Conflict of Laws Restatement No. 2—Chapters on Jurisdiction including besides the Introduction, Chapters on General Principles and Jurisdiction of Courts Taking the Subject Down Through Section 125. .60 a copy.

Contracts Restatement No. 2—Consideration, Formation of Formal Contracts, Joint Contractual Obligations and Rights, Sections 73 to 128 inclusive. .50 a copy.

Commentaries on Contracts Restatement No. 2. .30 a copy.

Torts Restatement No. 2—Privileges to Commit Intentional Invasions of Interests of Personality, Sections 78 to 107 inclusive. .75 a copy.

Commentaries on Conflict of Laws Restatement No. 2. .30 a copy.

Commentaries on Torts Restatement No. 2. .35 a copy.

SOME MORE LAW "WHEN LAW WAS LAW"

By Hon. William Renwick Riddell
Associate Justice Supreme Court of Ontario

THE encomium of the Editor of the American Bar Association Journal, December, 1926, p. 841, on the Selden Society and its publications is well deserved. Not one of its volumes is without delight coupled with instruction for the real lawyer, the member of a liberal and a learned profession who loves the study of the law, past and present.

One might be pardoned for thinking that there was nothing for an American or Canadian lawyer in a publication comprising select cases tried in the Middle Ages in Fair, Staple and Tolsey Courts—what have we to do with Piepowder, Fair Moot, or the "Curia vocata Tollseld?" It is true that less than a century ago, there were in Upper Canada several Fairs, and, as Blackstone says: *Commentaries on the Laws of England*, Bk. iii, p. 32, a Court of Piepowder is "incident to every fair"; this Court, however, never took root on this Continent with "sac and soc and infangthef."

But these three kinds of Courts were the Local Courts in which the Law Merchant was chiefly administered centuries before Lord Mansfield, and it was worth while for the Selden Society to publish a volume of *Select Cases Concerning the Law Merchant, A. D. 1270-1638 . . . Local Courts*, 1908. The volume loses nothing of value or interest by the fact that it is edited by Professor Charles Gross of Harvard. Waiving all thought of instruction, we may find in it much of interest, even amusement.

The first thing to be noticed is the extreme strictness of the practice—Law was Law, adjective as well as substantive.

On Friday, May 25, 1302, 30 Edward I, Christine of Darlington, sued Adam Burser of Bury St. Edmunds, in the Fair Court of St. Ives for that he at the Fair on Wednesday last in this present year, "insultavit ipsam turpibus verbis vocando ipsam meretricem, seductricem et alia enormia dicendo . . . per quam defamacionem ipsa perdidit creanciam versus quemdam amicum suum de vj. quarteriis frumenti ad grave dampnum suum xl. li . . ." reviled her with shameful words, calling her meretrix, knave and saying other atrocious words . . . whereby she lost credit with a certain friend of hers for six quarters of wheat to her great damage, £40.[1] Adam is present and denies everything—but the interesting point is that he craves judgment by reason of a technical defect—what we used to call a special demurrer *ore tenus*. He says that she counted (narravit) on a certain Wednesday last "in this present year" when she ought to have said "in the twenty-ninth or thirtieth year of the reign of King Edward," "sicut consuetudo est in quilibet curia"—as is the custom in every Court. The plaintiff contended that she had pleaded sufficiently "quia satis notum est unicuique de die et anno quando titulus curie[2] specificat annum regni regis E. tricesimum"—because the day and year are sufficiently known to anyone since the style of the Court specifies the thirtieth year of the reign of King Edward. This was not so clear that it was decided by the Court; but after putting themselves on the judgment of merchants, "in consideracione mercatorum," the parties were allowed to settle: Adam acknowledged himself in the wrong and paid 6d. fine.

Here we have the *lex mercatoria* made a question of fact, and the sufficiency of a pleading, determined by the jury.

A defendant because he did not deny "words of Court," that is, did not deny the claim in proper technical language, was adjudged in default; and to be safe, he had to deny everything alleged against him.

William of Papworth, May 10, 1291, sued John of Kent for the balance of the purchase money of a horse sold him for 43s. 4d. "et pro uno quadrante ei tradito ad argentum dei"—and for a farthing delivered to him (William) as a God's penny—he having paid of the 43s 4d, only 23s 4d. John "denies the words which should be denied and says expressly that he owes him nothing"; but he says nothing of the God's penny and "consideratum fuit per mercatores quod ex quo contractus factus inter dictum W. querentem et pretarum J. defendentem affirmatus fuit pro j quadrante dato predicto Willelmo in argento dei quod quidem argentum dei dictus J. non defendebat, remaneret tanquam indefensus, et dictus W. recuperet, &c. et Johannes in misericordia ijs. solvit. Et taxata sunt dampna ad iijs"—it was awarded by the merchants that whereas the contract made between the said plaintiff W. and the defendant John aforesaid was confirmed with a farthing given the aforesaid William as a God's penny, which God's penny the said John did not mention in his plea, therefore let him (John) remain as if not defended and the said W. recover . . . and John pays 2s. as a fine, and the damages are assessed at 3s.[3]

In another case the defendant "defendit verba curie[2] et receptionem argenti dei et totum contractum"—denies the words of Court and the receipt of a God's penny and the whole contract:

1. *Op. cit.*, p. 85. The editor suggests that £40 is an error for 40s. that is, instead of "xl. li." we should read "xl.s" "Seductrix" feminine of "seductor", not seducer in our modern sense but rascal, knave, scamp, a vague term of abuse.

It will be seen that even "meretrix" was not actionable *per se*, but required special damages to make it actionable—that this was the law in England till 1891, 54.55 Vict. c. 51 (Imp.) and in Ontario till 1889, 52 Vict. c. 14 (Ont.). See French v. Smith, (1922) 53 Ont. L. R., 31 at p. 33.

2. In these MSS. our diphthong "ae" is written "e", e. g. *curie* for *curiae*; *etate* for *aetate*; "e" and "e" before a vowel are interchangeable; "set" is not unusual for "sed".

3. *Op. cit.*, p. 39, May 10, 1291. The "argentum Dei", God's silver, God's penny, corresponding to the Civil Law "arrha", the earnest of the Statute of Frauds—generally a farthing. A drink often was given instead of money to bind the bargain; sometimes along with money; *op. cit.*, pp. 47, 52.

and he succeeded, the plaintiff having to pay the fine for improperly bringing him to Court.[4]

Those who misconducted themselves at the Fair had short shrift, if the misconduct was proved.

Emma Haultain sued Richard Burdon—she said that she had rented a house from him for the Fair for 21d. on condition that he would allow no "meretrices" in his row; that he did receive "meretrices" and she paid the rent up to that time and then left. Afterwards on Sunday after Ascension Day, the landlord came and kicked, struck and ill-treated her. He denied everything properly and a trial was had. The inquest found that he had made no such bargain with the plaintiff but had the right to let his houses to whomsoever he wished[5] and that Emma had kept possession till the end of the term "per quandam ancillam," by a certain handmaiden. So Emma had to pay a fine of 6d. for making a false claim; but Richard had no right to strike her and so he paid her 2d. damages and also paid a fine of 6d.

Thieves were quickly disposed of: Agnes King proved that Henry Crabbe had in open fair robbed her of a "camisia precii ijd. ob." chemise worth 2½d.; she recovered the garment and the vill was delivered of the said William, i. e., he was banished the vill.[6] He was in luck; had the value been over 12d., he would have been hanged.

Blackstone: *Commentaries, &c.*, Bk. iv, p. 238, says that "the mercy of juries will often make them strain a point and make them bring in larceny to be under the value of twelvepence when it is really of much greater value . . . this . . . is . . . a kind of pious perjury . . ." This "pious periury" may possibly have appeared when Roger of Pontefract and Beatrice, his wife, were found by the jury to have stolen a pair of shoes from Margaret Shepherd. "Et quia dicti sotulares sunt parvi precii pro quo precio nullus amittet vitam aut membrum, consideratum est quod dicti Rogerus et Beatrix deliberent villam S. Yvonis ne amplius de cetero redeant ibidem"—and inasmuch as the said shoes are of little value for which value no one should lose life or limb, it is awarded that the said Roger and Beatrice leave the vill of St. Ives and never more hereafter return thereto.[7]

The defense of nonage also saved from death but not from banishment. A lad ten years of age was caught stealing a purse at the Fair: "set[8] quia idem J. non fuit de etate[8] ad sustinendum judicium quod talibus malefactoribus ordinatum est et provisum, consideratum est quod villam S. Yvonis et feriam ejusdem adjuret"—but since the said J. was not old enough to bear the punishment ordained and provided for such evil-doers, it is awarded that he abjure the vill of St. Ives and the Fair thereof.[8]

No nonsense was stood from jurymen, either: a Fair was no place for a crank. "Willelmus filius Ricardi summonitus in quadam (inquisicione) contradixit xj socios suos fraudulentur et maliciose nec cum illis voluit concordare. Ideo pro contemptu xxd., plegius Nicholaus Legge"—William, Richard's son, called as a juryman on a certain (inquest), fraudulently and maliciously contradicted his eleven associates and would not agree with them. So for contempt (he is fined) 20d. pledge Nicholas Legge.[9]

And jury duty could not be refused. We find several fined for refusing to make oath in inquisitions.[10]

One of the most curious circumstances in this volume is the adumbration of the famous John Doe and Richard Roe who figured as Pledges for the Prosecution in the old Writ of Capias ad Respondendum, the memory of which is so sweet to Common Lawyers—*valde deflendi*.

We are told that Doe and Roe were to be heard of in Chancery proceedings as early as the time of Henry VI; here we have Johannes Doo et Ricardus Roo, Plegii pro Prosequendi in 1472: the equally mythical if less famous John May and Richard Day; Thomas Went and Richard Kent: John Goose and Nicholas Raven also appear but we regret not to see John Denn and Richard Fenn.[11]

When I add that a "dies amoris," a love day, was often given to litigants to arrange a settlement, I may have said enough to indicate the interest this volume should awaken.

Osgood Hall, Toronto, January 3, 1927.

4. *Op. cit.*, p. 43, May 17, 1291. Thomas Humfrey of Paris claimed that he agreed with John of Flitt, that John should carry a hundle (quoddam fardellum) to London from St. Ives for him for 12d and that he gave him a farthing as "argentum dei".

5. The "meretrices" were a constant source of trouble to the authorities. We find men, time and again, paying a fine for receiving them into their houses or letting them accommodation. They were often harboured by barbers, and in one case a bath-woman (Balniatrix) was charged as a harlot, just as a few years ago in London massage establishments became notorious as bagnios; in the Fair Courts, a fine was generally imposed on both the woman and the man. In one case where Avenandus was found to have received "meretrices", he was pardoned because he was poor, *op. cit.*, p. 16, and the bailiffs were ordered to gather all such women and bring them to Court. The woman had sometimes to find-pledges "quod se honeste habebit"—that she would behave herself decently, *op. cit.*, p. 24. Sometimes the Court indicated business instincts; Ralph Clerk was condemned because he let six houses to such women "cum potuerit aliis eas locasse"—when he could have let them to others. He had to pay 12d fine. May 16, 1302; *op. cit.*, p. 83.

6. *Op. cit.*, p. 53—June 4, 1291.

7. *Op. cit.*, pp. 37, 38. May 7, 1291. I do not find larceny punishable at any time by loss of limb: Grand Larceny, i. e., larceny of value over 12d was at least from the time of Henry I punishable by hanging, and Petit Larceny by imprisonment or whipping. See Blackstone, *Commentaries, etc.*, Bk. iv, pp. 229, 237.

8. *Op. cit.*, p. 42: May 14, 1291. A child under 14 is *prima facie, incapax doli*, but *malitia supplet aetatem*: this boy of ten was apparently considered capable of crime but not able to stand the whipping, etc., so he was banished.

9. *Op. cit.*, p. 91; May 6, 1312. "contradico", speak against, contradict, in post Augustan Latin, but Tacitus and Suetonius use it. "If there is but one dissentient juryman, his words can be disregarded and he can be fined." Pollock and Maitland, *History of English Law*, 2d edit. vol. 2, p. 636. In Ontario we can in civil cases disregard two dissentients, but we cannot fine them. Perhaps William Richardson feared that the jury might be attainted for its verdict with very severe consequences. Before being allowed to leave Court, he had to find security that his fine of 20d would be paid.

10. See e. g., *op. cit.*, pp. 42, 62.

11. *Op. cit.*, pp. 123 (A. D. 1458); 126 (A. D. 1472); 129 (A. D. 1493); 131 (A. D. 1518).

A Binder for the Journal

On page 119 of this issue, readers of the Journal will find an announcement of what we regard as a very satisfactory binder of the Journal. For some time we have been receiving frequent inquiries as to a binder, but heretofore have not been able to find one which we cared to recommend. Many members will no doubt be glad to preserve their Journals for the coming year—and perhaps for past years—in this manner, and we suggest that those who are interested turn to the announcement.

LETTERS OF INTEREST TO THE PROFESSION

New Jersey's Court of Chancery

Editor, AMERICAN BAR ASSOCIATION JOURNAL:

Writing in the February Journal, Charles P. Megan says, "New Jersey alone, I think, still has a separate court of equity." It has, the Court of Chancery. Likewise Delaware, and I believe Kentucky, have separate courts of equity.

The New Jersey Court of Chancery, which consists of Chancellor, assisted by ten Vice-Chancellors, has a long and interesting history. Lord Cornbury, governor of New Jersey, when it was a royal colony, established the first Court of Chancery. It consisted of the governor and three members of his council. Shortly thereafter the governor alone, with the approval of the king, held the court. That was in 1705. In 1770 the governor passed an ordinance declaring the Court of Chancery to consist of himself, with power to appoint all necessary officers. The first constitution of the state, that of 1776, recognized the Court of Chancery as then existing. The constitution of 1844, the one now in force, provided that the Court of Chancery should consist of a Chancellor. The practice in the New Jersey Court of Chancery, from the beginning, was that of the Court of Chancery in England, and, except where modified by the constitution, statutes or the decisions of the court, that practice is still in vogue.

Attempts to abolish the New Jersey Court of Chancery, and confer equitable jurisdiction on the law courts, have always proved abortive. New Jersey seems to get along very well with its Court of Chancery, and the opinions it renders, reported in the New Jersey Equity Reports, have attained high rank and are frequently cited and followed by courts of last resort in other states and by the United States Supreme Court.

The men who are, and who have been Chancellors and Vice-Chancellors have been profound lawyers and able judges. The late Associate Justice Pitney of the United States Supreme Court was Chancellor of New Jersey, and his father before him, Henry C. Pitney, was one of the ablest Vice-Chancellors New Jersey ever had. Frequently men have gone from the chancery bench to the law bench. One man, William J. Magie, had the distinction of being Associate Justice, and Chief Justice of the Supreme Court and Chancellor. Lindley M. Garrison, Secretary of War in President Wilson's cabinet, was a Vice-Chancellor, and one of the present Vice Chancellors, Vivian M. Lewis was the Republican candidate against Woodrow Wilson, when the latter was elected governor of New Jersey, and James F. Fielder, who succeeded Wilson as governor, is at present one of the Vice-Chancellors.

This bit of history concerning the history and personnel of the Court of Chancery of New Jersey goes to show that a separate court of equity is by no means archaic, but is a useful instrumentality in the present day administration of justice in one of the most densely populated and highly industrialized states of the union.

JOHN T. FITZGERALD.

Irvington, N. J., March 2.

U. S. Supreme Court and the Rule-Making Power

Editor, AMERICAN BAR ASSOCIATION JOURNAL:

I have been much interested in the argument going on over the proposed bill giving the Supreme Court of the United States power to regulate by uniform rules the practice in the Federal Courts on the law side. In this state, West Virginia, we have the common law system of pleading somewhat modified by Statute and I desire to express my entire concurrence with Senator Walsh in his opposition to this bill. It seems to me that his argument that such new system of rules must either approximate the common law system or the Code system, or be something substantially different from both of them is unanswerable. While we think that the common law system as used by us, while not perfect, is superior to the Code system we have no desire to force a system of rules in the Federal Court similar to the common law system on Federal Courts sitting in states which use the Code system of pleadings, but we are just as much opposed to having the Code system or a new system differing from the common law system now prevailing in this state forced upon the Federal Courts sitting in this state.

The equity rules in force from the Supreme Court of the United States work no hardship because they do not differ in essentials from the old chancery practice, which, with few changes prevails in our courts of equity, but conformity of the practice of the Federal Courts in law actions with the practice prevailing in the local courts as a practical matter is of infinitely more importance to the lawyers living and practicing in West Virginia than conformity of the rules of practice prevailing in the Federal Courts sitting in different states.

While the American Bar Association has acted upon this matter at variance with my views and I believe with the views of the lawyers of this state, I desire to express my approval of Senator Walsh's courageous and so far, successful fight against this bill.

BERKELEY MINOR JR.

Charleston, W. Va., March 1.

Selden Society's Publication

Editor, AMERICAN BAR ASSOCIATION JOURNAL:

Would you kindly publish the following notice about the Selden Society:

"The Selden Society has despatched to its American members Volume 42, being the volume to which members are entitled in respect to their subscription for the year 1925. This goes to members post and duty free through the Smithsonian Bureau of International Exchanges. Any American member who does not receive his volume should communicate with the American Secretary, Mr. Richard W. Hale, 60 State Street, Boston, Mass.

"The Selden Society has published eight volumes of the Year Books of Edward II and this volume is Volume 9 of the same series. It is edited by Mr. G. J. Turner. It contains all the reports of Trinity term 4 Edw. II., together with a few undated reports of earlier terms."

RICHARD W. HALE.

Secretary and Treasurer of the Selden Society for the U. S. A.

Boston, Jan. 21, 1927.

Wishes to Exchange Bookplates

Editor, AMERICAN BAR ASSOCIATION JOURNAL:

The Sidney Fuller Smith Library of Sigma Nu Phi Fraternity (Legal), a member of the American Association of Law Libraries, is making a collection of bookplates (ex-libris) of American and English lawyers, and would welcome prints as gifts to its collection in exchange for its own bookplate designed by Arthur Howard Noll, LL.D.

Prints should be sent to the Librarian, Sidney Fuller Smith Library, Sigma Nu Phi Fraternity (Legal), 1719 K. Street, N. W., Washington, D. C.

CARLYLE S. BAER,
Librarian.

Washington, D. C.,

Judge Simeon E. Baldwin

Editor, AMERICAN BAR ASSOCIATION JOURNAL:

The death of Judge Simeon E. Baldwin at New Haven, Connecticut, one of the founders of the American Bar Association, is regarded as a personal loss by the hundreds of law students who sat under his instruction and gained from him basic principles, which the years do not efface.

Judge Baldwin was an ideal law lecturer, he could state a great principle in few words, and backed it up with the proper citation. He was a mighty conserver of his own time. The story used to be told, that in the preparations for the Sesquicentennial Celebration of Yale University, the faculty was seeking for someone to write a history which might be used at the time. Various excuses were offered by members of the academic faculty, and Judge Baldwin exclaimed, "I can do it, I have a half hour a day that I am not using."

The old students will recall the characteristic words used by Judge Baldwin in a recitation to indicate that the student need not recite further "Sufficient; Sufficient."

How greatly enriched has been his generation because these words were not pronounced in his own case until he had almost reached his four score years and ten.

Yours very truly,

GILSON BROWN,
Yale Law School 1907.

Alton, Ill., Feb. 8.

Report of Committee on Reference Books on the Constitution

The following report is the result of a suggestion made by Mr. Harry Chandler, of the Los Angeles Times, to the Executive Committee of the American Bar Association which met in Los Angeles, in January, 1926, setting forth the need of a Reference Library on the Constitution for the million and a half students who engage in the great newspaper oratorical contest.

President Long, of the Association, appointed this committee. So many lawyers showed interest in the work of the committee, and asked for its report, that it is now sent to each member without cost to the Association.*

We have divided our recommendations into two classes:

Class "A"

Books that we consider more or less indispensable for students of the Constitution of all ages, and particularly in schools and colleges.

Class "B"

Books for the more intensive student who desires a broader knowledge of the whole subject.

Our endeavor has been to select a well-rounded library that would cover the interpretation of the Constitution and its historical background with as little repetition as possible. We find that many lawyers are seeking information along the same line. The fact that we have omitted a particular book is not a reflection upon that book; this list is selected for a particular purpose. We have omitted meritorious works because they were duplications, or not adapted to this particular purpose. The following is the list:

Class "A"

"THE CRITICAL PERIOD OF AMERICAN HISTORY," by John Fiske; Houghton-Mifflin Co., Boston; one volume; $2.50.

An indispensable book to the study of the origin of the Constitution. Should be read first of all; describes the breakdown of the Confederation, the chaos, anarchy, and disunion into which the states were falling, the events which led up to the adoption of the Constitution, and carries the reader through to Washington's inauguration.

"THE CONSTITUTION, ITS STORY AND BATTLES," by F. DuMont Smith; Kerr Co., Pasadena, (copyright owned by Committee on American Citizenship); one volume; $2.00.

This story is a brief history of the Anglo-Saxon polity from the time that our Teutonic ancestors first came in contact with the Romans down to the adoption of the Constitution. It sketches briefly the Anglo-Saxon conquest of England; the Saxon Kingdom, the Norman conquest, and the long Constitutional struggle in the mother country; to which is added the Fifteen Decisive Battles of Constitutional Law which appeared in the AMERICAN BAR ASSOCIATION JOURNAL.

"THE CONSTITUTION OF THE UNITED STATES; ITS SOURCES AND ITS APPLICATION," by Thomas J. Norton; Little, Brown & Company, Boston; one volume; $2.00.

Takes the Constitution paragraph by paragraph and gives in clear, simple, and direct style the meaning of each, its derivation, where it is not original, and the manner in which it has been interpreted and applied by the Supreme Court. It is a book of as much value to the lawyer as to the student in the schools and colleges.

"THE CONSTITUTION OF THE UNITED STATES," by James M. Beck; George H. Doran Co., New York; one volume; $2.50.

Covers in narrative form the events leading up to the meeting of the Constitutional Convention; describes the personnel of that great body and the various struggles and compromises from which it was adopted.

"THE SHORT CONSTITUTION," by Wade and Russell; American Citizen Publishing Company, Iowa City; one volume; $1.00.

Judge Wade, of the Federal Bench of Iowa, devoted many years to citizenship work and is really the father of the Committee on American Citizenship. The book is elementary in character, especially adapted to the use of teachers who are required by state laws to teach the Constitution, as it analyzes briefly and clearly every part of the instrument as well as the nature of our State Governments.

"AN INTRODUCTION TO THE STUDY OF THE CONSTITUTION," by Professor Charles E. Martin, of the University of Washington. Oxford University Press, New York; one volume; $3.50.

Gives the charters of the Colonies and their Constitutional struggle with the Crown; it cites and analyzes the leading cases that have developed the Constitution. The closing chapters, "Current Constitutional Controversies," and "American Ideals," are particularly valuable.

"CONGRESS, THE CONSTITUTION AND THE SUPREME COURT," by Charles Warren; Little, Brown & Co., Boston; one volume; $3.50.

Collates all of the leading cases in which Acts of Congress have been held unconstitutional; it gives, for the first time, a full description of the much discussed "Five to Four" decisions.

Class "B"

"THE FEDERALIST," Lodge's edition; G. P. Putnam's Sons, New York; one volume; $3.50.

This book is classic and needs no comment.

"THE SUPREME COURT IN UNITED STATES HISTORY," by Charles Warren; Little, Brown & Co., New York; two volumes; $10.00.

This is the historical work that received the Pulitzer prize last year.

"LIFE OF JOHN MARSHALL," by Albert J. Beveridge; Houghton-Mifflin Co.; four volumes; $20.00.

Is not merely a biography of John Marshall, but a complete political and constitutional history of the thirty-five years of Marshall's services on the supreme bench. It is a standard work on this subject.

"ALEXANDER HAMILTON," by Frederick G. Oliver; G. P. Putnam's Sons; New York; one volume; $5.00.

"JEFFERSON AND HAMILTON," by Claude D. Bowers, Houghton-Mifflin Co., Boston; one volume; $5.00.

These books are bracketed because they are complementary to each other. While each is in a sense partial and partisan, together they give a vivid portrayal of the two leading figures representing antagonistic views of the Constitution in its formative stages.

"THE CITADEL OF FREEDOM," by Randolph Leigh; G. P. Putnam's Sons; New York; one volume; $2.00.

Mr. Leigh is the Director of the Oratorical Contest hereinbefore referred to. His book gives very briefly an account of the Constitutional Convention; and an attractive picture of the founders. It is chiefly valuable in its description of the change in our State Governments from the Representative form toward pure Democracy by the Initiative, Referendum, and Recall.

"OUR CHANGING CONSTITUTION," by Charles W. Pierson; Doubleday, Page & Co., New York; one volume; $1.50.

This volume of one hundred and seventy pages emphasizes the change of the Constitution through interpretation, neither commending nor criticizing this tendency but describing it with great clearness.

"MODERN DEMOCRACIES," by James Bryce; The MacMillan Co., New York; two volumes; $8.00.

Lord Bryce gives first a general survey of the Democratic form of government in theory and in practice; and then examines and compares six Democracies in their actual working: France, Switzerland, Canada, The United States, Australia, and New Zealand.

F. DUMONT SMITH,
EDGAR B. TOLMAN,
ERNST FREUND,
Committee.

*Refers to action of Committee in sending list directly by mail to members. The list is here reprinted to emphasize its interest and importance and preserve it for reference.

Sculptor of Statue of Chief Justice White

The Journal is in receipt of a booklet containing an account of the ceremonies at the unveiling of the statue of the late Chief Justice Edward Douglass White at New Orleans on April 8, 1926. An account of this interesting event appeared in the Journal at the time, but through a regrettable oversight no mention was made of the sculptor of this beautiful statue, Mr. F. Bryant Baker of New York City. Mr. Baker was present at the unveiling of his work and made a brief talk at the request of Chairman John Dart.

MEMBERSHIP IN AMERICAN BAR ASSOCIATION

Qualifications

THE constitution declares membership in good standing at the bar of any state during the last three years (part of which may have been spent in one state and part in another) a prerequisite to election.

Dues

The dues are $6.00 per year. There is no initiation fee. Members receive as perquisites of membership, the monthly "American Bar Association Journal" and the printed annual reports of the proceedings of the Association, constituting a valuable year book of the profession in this country, in which their names are listed as members, both in the alphabetical list and in the list of members arranged by cities and towns in states.

Life Membership

Annual dues, at the option of any member, may be commuted by the payment of $200.00 at one time; and thereafter no further dues shall be payable by any such member.

Application Blanks

Blank applications for membership in the American Bar Association may be obtained by applying to any of the following:

Membership Committee

Charles W. Walton, Chairman; 78 Chapel street, Albany, N. Y.
Moorfield Storey, 735 Exchange Bldg., Boston, Mass.
Francis Rawle, Packard Bldg., Philadelphia, Pa.
Henry St. George Tucker, Lexington, Va.
Jacob M. Dickinson, 231 So. La Salle St., Chicago, Ill.
Frederick W. Lehmann, 600 Merchants Laclede Bldg., St. Louis, Mo.
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Peter W. Meldrim, 1007 National Bank Bldg., Savannah, Ga.
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NEWS OF STATE AND LOCAL BAR ASSOCIATIONS

California

News of San Francisco Bar

(From the San Francisco Recorder)

Henry E. Monroe was elected president of the Bar Association of San Francisco at the annual meeting. Other officers elected were: Maurice E. Harrison, senior vice-president; M. C. Sloss, junior vice-president; governors (two-year term), Frank P. Deering, A. A. Rosenshine, William M. Simmons and Florence A. McAuliffe.

President Warren Olney, who presided, presented the report of the board of governors. He commended the work of the grievance committee as it had functioned during the past year under the chairmanship of Francis V. Keesling and praised those members of the association who had conducted disbarment proceedings or had opposed applications of disbarred lawyers for reinstatement.

He informed the membership of the proposed removal of the association to the Russ building upon its completion, where more space would be available to the membership for less money, and told of the establishment by the association of a bureau through which young lawyers seeking employment might be placed in touch with law firms and practitioners seeking assistants, as well as of the effort being made under the direction of Charles A. Shurtleff, O. K. Cushing and A. L. Weil to assist the Legal Aid Society by securing the services of lawyers willing to help in the work of that society.

He commented upon the successful outcome of the campaign for the election of superior judges, on the lessons of that campaign and the splendid cooperation of the bar and the press to make it a success, mentioning particularly the work of Albert A. Rosenshine and C. J. Goodell in that connection.

He called the attention of the membership to the creation of two trust funds of $10,000 each, in memory of the late Alexander Morrison, one by Mr. Morrison's former associates composing the firm of Morrison, Hohfeld, Foerster, Shuman & Clark, and the other by Mr. Morrison's widow, the income of the first to be devoted to providing annually for a lecture by some notable person, under the auspices of the association, on subjects relating immediately to the legal profession or to the administration of justice, and the other for the publication of the lectures given under the first foundation.

Kansas

Plan for Bar Discipline

President Stone of the Kansas State Bar Association recently sent the following letter to the members:

At the Topeka meeting of the Association a committee report was submitted recommending the incorporation of the Bar. Action upon this report was deferred. Without arguing the merits of the incorporation of the Bar, I suggest that the strongest plea urged by its advocates is that such incorporation will enable the Bar to purge itself of unworthy members. It has been suggested that this end can be practically accomplished *without incorporation* and without any additional statutory provisions.

After thoughtful consideration I have concluded to assume the responsibility of putting in motion machinery which will accomplish the desired result. I have appointed a Grievance Committee of three in each congressional district. The selection of the members of these several committees has been made with care so that men have been chosen of recognized ability in the profession and of high standing as citizens.

The functions of these committees will be to receive complaints against lawyers within their respective congressional districts; to investigate such complaints; to confer with and, if deemed wise, reprove or reprimand the lawyer against whom the complaint is made. If under all the circumstances it be found proper that the charges should be presented to the State Board of Bar Examiners, then the duties shall rest upon this committee of filing formal charges and presenting them as prosecutors before said Board. The appointment and the functions of this committee should be widely advertised so that not only brother lawyers but any complaining client or other layman may feel free and welcome to make and present to the committee any charges that to the complainant may seem proper. It is not intended that this committee shall be used as a means of prosecution of members of the Bar but for the protection of the unoffending, as well as the prosecution of the offending brother.

A list of the members whom I have so appointed is herewith enclosed. I wish that you would see that your own local Bar is fully advised of the appointment of the committee; that the appointment be not a barren gesture but that you will assist in every way toward the proper functioning of the committee in your own bailiwick.

I have not assumed to take this action without a conference with lawyers and judges throughout the State. I have found no opposition to it and every encouragement to make the appointments at this time rather than to have the matter rest until another year has passed by.

It is not intended that the committees should in any way infringe upon the powers or duties of the State Board of Law Examiners, but that they should be assistants to it and relieve that Board of being at the same time judge and prosecutor.

ROBERT STONE, President,
Kansas State Bar Association.
Jan. 10, 1927.

Nevada

Nevada Bar's Annual Meeting

The Nevada Bar Association held its annual meeting on Jan. 21 and 22 in Reno. There was a good attendance and much interest manifested in various matters, particularly concerning the uniform Acts proposed by the American Bar Association; a special committee was appointed which will have charge of the matter of presenting same to the Nevada Legislature, which is now in session.

Under the constitution of the Nevada Bar Association, no one may be elected as president twice in succession. Those elected to offices of Nevada Bar Association for the ensuing year are: H. R. Cooke, Reno, President; A. L. Scott, Pioche, First Vice President; George S. Green, Reno, Second Vice President; Melvin E. Jepson, Reno, Secretary; E. L. Williams, Reno, Treasurer.

The legislative counsel consists of the following: Prince A. Hawkins, Reno, chairman; A. L. Haight, Fallon; A. S. Henderson, Las Vegas; G. A. Montrose, Gardnerville; Morely Griswold, Elko; Roger Foley, Goldfield; Edgar Eather, Eureka; J. A. Langwith, Winnemucca; H. E. Browne, Austin; A. L. Scott, Pioche; F. L. Wood, Yerington; J. A. White, Hawthorne; W. D. Hatton, Tonopah; John L. Chartz, Carson City; C. L. Young, Lovelock; W. S. Boyle, Virginia City; J. M. Lockhart, Ely.

Retiring President Prince A. Hawkins made an address on the subject, "Range Live Stock Industry," which caused considerable discussion. The Association by resolution requested the Legislature to have this printed as a state document and also ordered that copies be forwarded to the congressional delegation in Washington with the request that it be published in the Congressional Record.

There was also much discussion of a resolution offered by James D. Finch, asking that the Nevada legislature memorialize congress that all public lands in Nevada and other land states be ceded to the states. It was first moved to make the resolution a special order of business for the afternoon, but it was finally laid on the table.

North Carolina

Annual Meeting to Be at Pinehurst

The executive committee of the North Carolina Bar Association has selected Pinehurst as the place and May 5, 6 and 7 as the time for holding the 1927 meeting. President Chas. S. Whitman, of the American Bar Association, and Claude G Bowers, editorial writer on the Evening World, will be the principal speakers.

Ohio

Ohio Bar's Midwinter Meeting

The Toledo Bar and their associates were royal hosts to the Ohio State Bar Association members and wives attending the Mid-Winter Meeting of that organization which was held at Toledo, Ohio, January 27th, 28th and 29th, 1927. The sessions were held in the magnificent ball room of the recently opened Commodore Perry Hotel, and were well attended by a representative group of Ohio attorneys, who were pleased with the excellent program provided by President John M. McCabe of Toledo. Generous hospitality was extended to the visiting ladies, the reports of Committees demonstrated the increase in activities of the Association and the addresses delivered by recognized speakers stimulated the interest of the members in the subjects presented.

The Mid-Winter Meeting was called to order Thursday afternoon by President John M. McCabe, who introduced the Right Reverend Samuel A. Stritch, D. D., Bishop of Toledo, who delivered the invocation.

Addresses of welcome were presented on behalf of the City of Toledo by Mayor Fred J. Mery and on behalf of the Bar by President George D. Welles of the Toledo Bar Assn., and a response on behalf of the State Association was delivered by John A. Elden of Cleveland.

President John M. McCabe in his address entitled "Officers of the Court," commended the work of the Chairman and members of the Special Committee to Recodify the Ohio Corporation Laws, commented upon the powerful influence of the press in the administration of justice, advocated that Judges and lawyers assist the press by giving it information regarding important trials, which would tend to create an interest in and respect for courts, complimented the press for conducting an oratorical contest on the United States Constitution in the public schools, and recommended that Judges be empowered to prescribe rules of procedure and the appointment of a committee of Judges and practicing attorneys to formulate such rules.

Colonel William J. Donovan, Assistant United States Attorney General of Washington, D. C., in his address on "The relation of the Patent Law to the Sherman Anti-Trust Law," traced the law governing patent monopolies and the common law against monopolies from earliest Anglo-Saxon and Continental times, and discussed the present tendencies of the law as shown by recent Supreme Court decisions.

The report of the Committee on Admissions by John D. Andrews of Hamilton, contained the names of 147 new members.

Anthony B. Dunlap of Cincinnati, in reporting for the Executive Committee, directed attention to the increase in membership and finances, the installation of a new system of accounts for the Association, the success of the weekly Bar Association Bulletin, and the request for a recodification of criminal laws which had been referred to the Committee on Judicial Administration and Legal Reform.

The report of the Committee on Legislation, presented by Judge Walter A. Ryan of Cincinnati, advised the members that the Revision of the Corporation Laws had been introduced in both branches of the General Assembly and one hearing had been held before the Joint House and Senate Judiciary Committee.

Chairman A. G. Fuller of Findlay of the Committee on Grievances, reported that three minor complaints against Association members were being satisfactorily disposed of and that eight complaints against non-members had been referred to local Associations.

Chairman Reuel A. Lang of Cleveland submitted the report for the Committee to Aid the American Law Institute, which stated that the Restatements were being accepted by the Courts as the law, and proposed a resolution continuing sub-committees on particular Restatements of the Law until sub-committee reports were filed with and accepted by the parent committee. The report and resolution were adopted.

The names of 23 members of the Association who had died since the last Annual Meeting were contained in the report of the Committee on Legal Biography, which was prepared by Chairman Chase Stewart of Springfield.

The Conference of Bar Association Delegates held Thursday evening was presided over by Chairman George B. Harris of Cleveland. This Conference is patterned after that of the American Bar Association and is proving very effective in bringing before the State Association, subjects fostered by local organizations.

Upon roll call of the counties, the following matters were presented by the delegates named: John A. Elden of Cleveland, to allow Judges of the Courts of Appeals sitting outside their own districts, $25 per day and expenses; a motion to approve the proposal was carried. Former President Province M. Pogue of Cincinnati, to authorize the President of the Ohio State Bar Association to appoint not more than two delegates from counties having no local Bar Association; a motion to recommend to the State Association was carried. Mr. Pogue submitted also a recommendation for the appointment of a special committee to study, in cooperation with the committee of the American Bar Association, the subject of the selection of Judges, which proposal was approved. Chauncey D. Pichel, of Cincinnati, to approve the principles of the Bender Bill, pending in the Legislature, limiting jurisdiction of justices of the peace and mayors to their respective townships and municipalities. P. C. Prentiss of Napoleon, to amend the Ohio Constitution by authorizing the legislature to prescribe the Appellate jurisdiction of Courts of Appeal and Supreme Court, and to provide for the disability and disqualification of the Judges of the Courts of Common Pleas and Courts of Appeals. George W. Reed of Uhrichsville transmitted a recommendation of the Tuscarawas County Bar Association recommending the appointment of a committee to prepare and introduce a bill authorizing the creation by County Commissioners of Justices of the Peace Districts, with a minimum population of 12,000, and to define the jurisdiction and salaries of Justices. Charles B. Hunt of Coshocton submitted a proposal for a bill creating County Courts inferior to Common Pleas Courts. The three foregoing proposals were referred to the Committee on Judicial Administration and Legal Reform of the State Association. A. J. Miller of Bellefontaine, moved that the Committee on Judicial Administration and Legal Reform consider abolishing township governmental units, which motion carried.

Chairman Willis Bacon of Akron, reporting for the Committee on Uniform State Laws, recommended the passage of the Uniform Motor Vehicle Act, Uniform Tax Lien Law and Uniform Chattel Mortgage Law. The Committee report was approved.

The report of the Committee on Legal Education, presented by Clarence D. Laylin of Columbus, pledged cooperation of the State Association with the Supreme Court in maintaining the new general educational qualifications for admission to the bar and recommended careful consideration of other similar measures to complement present rules and to advance legal science.

Wm. G. Pickrel of Dayton submitted the budget of the Association for 1927, which had been adopted by the Executive Committee, with the recommendation of that Committee that the matter of the printing of the bound volumes of annual proceedings be deferred and an increase in dues of the Association be considered and presented at the July Annual Meeting. A motion by D. F. Anderson of Youngstown was passed providing for a referendum to determine the number of members of the Association who would be willing to pay additional for the bound volumes.

Former President John A. Cline of Cleveland presented that portion of the report of the Committee on Judicial Administration and Legal Reform relating to the revision of the Corporation Laws, and moved that the bill submitted by the Special Committee be approved and that the Committee on Legislation and each member of the Association be pledged to aid in securing a prompt enactment into law. Proposals to amend several sections of the bill were submitted, discussed and defeated, and the motion of Chairman Cline was adopted. Harry F. Payer of Cleveland moved a vote of thanks and appreciation to the Special Committee which had drafted the new corporation code, and that the Committee be continued for two years, which motion was carried.

Dean Henry M. Bates of Law College of University of Michigan, in his address on "Rising Tide of Legislation," declared this to be an age of radically and rapidly changing political, social, and economic conditions, with which courts are not equipped to keep pace, and which necessitated legislative action; that the phenomenon appeared in irregularly recurring cycles which in time tended to readjust itself, and that the future was menaced by governmental paternalism which should be thwarted.

Hon. Wm. Gibbs McAdoo, of Los Angeles, California, former Secretary of the Treasury, in his address on "Prohibition, Nullification and Lawlessness," stated the question to be whether we are to maintain a reign of law and progress according to law, or whether we are to slip back into the abyss and quicksands of lawlessness and anarchy, declaring prohibition enforcement to be obligatory, and expressed the opinion

that the repeal of the Volstead Act would not be valid; that if attempt were made to repeal it and to substitute therefor an unconstitutional statute or no statute at all, the Supreme Court would be constitutionally bound to hold the attempted repeal void, and the Volstead Act would remain law until passage of a valid substitute therefor.

The address by President Josiah Marvel of the Delaware Bar Association, Wilmington, Del., upon "The Rule-Making Power of the Courts," referred to those states which had given courts broader rule-making powers and to the fact that state and national administrative boards have such complete power, which indicated the willingness of legislatures to grant the same, and advocated that the courts accept the responsibility of using all such powers at present possessed and that legislatures would be willing to extend them.

Dean Roscoe Pound of the Harvard Law School, Cambridge, Mass., in his address entitled "The Law of the Land," stated the Anglo-Saxon system of common law was in constant struggle for supremacy but had always won wherever it had been introduced, that it is constantly changing and the legal axioms and dogmas of today are discarded tomorrow, that the common-law ideals are always changing, but there is in it a certain permanent enduring element which gives unity to the law of the English speaking countries—the technique of the common law lawyer, the art of the lawyer's craft, in which lie the essentials of the law of the land—which it is the duty of the common-law lawyer to preserve in its full vigor to be transmitted as a living instrument of justice among English-speaking people for all time to come.

The Mid-Winter Meeting banquet, which was attended by some 600 guests, was presided over by Judge John M. Killits of Toledo as toastmaster and addressed by Dean Roscoe Pound and Hon. Josiah Marvel.

J. L. W. HENNEY, Secretary.

Wyoming

Meeting in Wyoming

The Wyoming State Bar Association held a meeting in Cheyenne on January 13th and 14th, 1927. The report of the Committee on Legislation and Law Reform as to a number of the proposed Uniform Acts was adopted. Three very interesting papers were read, one on "Removal of Causes" by Hon. T. Blake Kennedy, Judge of the United States District Court for this District, one on "The Crime Menace—Some of the Causes and Some Remedies" by Hon. C. O. Brown, District Judge from Douglas, Wyoming, and another by Hon. William A. Riner, District Judge of Cheyenne, Wyoming, on Some Early Western Judges.

At the banquet on Thursday night, Hon. J. F. Mail, attorney of Denver, Colorado, who was formerly located at Rock Springs, Wyoming, gave a very entertaining address reminiscent of the practice of law in Wyoming some thirty years ago.

The annual meeting will be held next summer at Lander, Wyoming, at which time officers will be elected.

CLYDE M. WATTS, Secretary.

IN TWO PARTS—PART II

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The Rule-Making Power of the Courts

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The Conference of Bar Association Delegates

of The American Bar Association

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FOREWORD

THE Conference of Bar Delegates of the American Bar Association at its meeting in Denver in 1926, adopted a resolution providing for a new committee to be appointed by the Chairman of the Conference to be known as the Committee on The Rule Making Power of The Courts.

In order that each member of this Committee might independently present his individual thoughts upon the subject, and reflect perhaps some local views and situations, it was decided that the members should contribute a paper on the subject without conference with each other. Each member has contributed his own article as set out in the following pages. My own contribution is an address recently delivered before the Ohio State Bar Association.

The problems arising out of publication and distribution were happily solved by an agreement on the part of the American Bar Association JOURNAL to publish the articles as a supplement and mail the same to each member of the American Bar Association.

We trust that the subject treated in this manner will develop an increased interest on the part of the American Bar, not only as members of the American Bar Association, but as members of the several State Bar Associations.

We would suggest that the several State Bar Associations place the subject upon the programs of their future meetings and this Committee, if desired, will agree to use its efforts to secure a speaker to present the matter. The individual members of this Committee have severally agreed to serve in this behalf in localities nearest to them.

We also trust that the interest aroused by a general discussion of this subject will give the Committee further matters of progress to report to the next Conference of Bar Delegates to be held at Buffalo in August.

Clothing the Courts with the Rule Making Power is not only a reform of itself, but is a reform upon which may be based many other needed reforms in the administration of justice. We solicit the cooperation by suggestion or otherwise of every American lawyer who recognizes his individual responsibility as a member of the Judicial Department of the Federal and of his own State Government.

JOSIAH MARVEL, Chairman.

Wilmington, Delaware, March, 1927.

EXPERT CONTROL OF LEGAL PROCEDURE THROUGH RULES OF COURT

By Edson R. Sunderland

THE strong effort which is being made by the legal profession of the United States, to place the regulation of legal procedure under the control of the courts, has the double purpose of saving the public from the burden of an utterly inadequate administration of justice, and of rescuing the profession from the undeserved charge of responsibility for that inadequacy. The grave dissatisfaction with the performance of the courts is not confined to the laity, but is fully shared by that numerous body of lawyers who feel that the practice of the law is primarily a public service. But the causes of the failure have not been so clearly recognized, and the first step toward an effective remedy must be a sound diagnosis.

Now the legal profession differs from all others in one striking particular. It operates under a procedure prescribed by law, so that every member of the profession is required to employ the same standardized technique. The state has always insisted upon keeping control of the mechanism for administering justice, making it a public monopoly, and it has pursued the policy of rigidly prescribing rules to govern the practice of the courts. Lawyers compete with one another only within the limits of the established rules. No one is allowed to outbid his competitor by offering a new remedy or by using a superior procedure. All members, of the bar,—the most progressive, enterprising and intelligent as well as the most commonplace,—suffer in almost equal measure from the clumsy and useless requirements of the current system. If a lawyer, so circumstanced, fails to meet the expectations of his client, how can it be justly said that the fault is his?

Compare the lawyer's position with that of the physician. Legislation does not in the slightest degree prescribe the methods which he must employ. Established practice counts for nothing in the face of a new discovery. Every member of the medical profession has a direct, constant and powerful incentive to strive after new processes and to employ them at once in the service of society. The physician is master of his own procedure. He may follow the practice which he considers good and reject the practice which he disapproves. Since society gives him complete personal freedom in his choice of methods, it may properly hold him individually responsible for the results produced.

No one supposes that the administration of justice can ever be conducted without uniform rules which operate equally upon all who practice before the courts, so that responsibility cannot be so fully individualized in the case of the lawyers as it is with those who serve in the unrestricted fields of science, commerce and industry. At most the responsibility belongs to the profession as a whole, and the popular instinct which blames the entire bench and bar for the failures of the judicial establishment, is to that extent sound.

But the same considerations which exempt the individual lawyer from responsibility, operate equally to exempt the profession. The bench and bar have little more to do with the rules under which they work than has the individual attorney. The entire profession is forced to perform its duties under a procedure which it does not control. No other profession, and indeed no other social group, was ever placed in so helpless a position. The strong genius for government which our people possessed in the simple days when the republic was founded, seems to have been lost in the tremendous territorial expansion and the deluge of material prosperity which has surpassed all records in the history of mankind. We have completely outgrown our facilities for administering justice, but while we have welcomed and encouraged the services of experts in every other field we have never permitted legal experts to control the complex machinery of our courts.

The problem now confronting the United States is to get rid of the incompetent and unintelligent regulation of legal procedure by legislative bodies, put it in the hands of experts and then see to it that those experts are held accountable for organizing and maintaining a system adequate for our needs. That means, of course, the substitution of court rules for legislative codes.

The distressing inferiority of American legal procedure as compared with that of Great Britain is a conspicuous demonstration of the difference between expert and non-expert regulation. We inherited a system which had been developed through centuries of effort by the bench and bar of England. It was a system which in its day did fairly well, for the era of industry had hardly begun in 1776, and the courts were able to operate with a speed and accuracy fairly well adapted to the society which they served. But under the stimulus of the great industrial and commercial development of the 19th century, the demands upon the courts were enormously increased. Delays and uncertainties which were merely annoying in the leisurely period of sailing vessels and horse transportation, might well become intolerable in a high pressure age of steam, electricity, and gasoline. The very best ability was needed to keep the courts adjusted to the rapidly changing conditions in society. No one could possibly do this except the legal profession, for no one else understood the mechanism of litigation. England seems to have kept this vital principle in mind, and the development of English legal procedure was never taken out of the hands of the courts. The result was that the experts in the administration of justice kept pace with the experts who were revolutionizing commerce and industry. In the United States, on the other hand, an overconfident democracy disregarded the lessons of experience and placed the regulation of the courts under the direction of the political representatives of the people. They had no knowledge of the machinery which they undertook to control, and no appreciation of procedural possibilities. The tremendous changes in modern life have loaded the courts with novel problems of infinite variety, but the rigid and clumsy codes under which they operate have almost destroyed their usefulness. Frightened by the collapse of the judiciary in dealing with crime, the people are frantically demanding the imposition of the most appalling sentences, as though the one criminal who is caught and convicted were a scape-goat carrying the sins of the ninety and nine who go free. Arbitration is proposed as an escape from the tech-

nicalities of procedural law; and administrative boards and commissions are constantly being created in order to withdraw from the courts a vast range of questions which are beyond the capacity of their obsolete methods.

Apparently nothing more important than familiar tradition has kept the judicial establishment out of the stream of modern progress. Not only is every other phase of contemporary American life studied and directed by experts, but new tribunals supplementing the courts, whether strictly judicial or partly administrative, have in almost every instance enjoyed the benefit of regulation by those who are specialists in the work. All the new courts which Congress has established since the Field Code destroyed professional initiative in ordinary legal procedure, have been given express power and authority to make and amend their own rules of practice. This has been true of the Court of Claims, the United States Court for China, the Court of Customs Appeals, the Commerce Court, the present Supreme Court of the District of Columbia, the Interstate Commerce Commission, the Board of General Appraisers, the Board of Tax Appeals, the Federal Trade Commission, and the Federal Power Commission. The states have followed the same course, and every railroad or public utility commission and every industrial accident board itself makes the rules for the regulation of its own practice and procedure. Only the regular courts drag the ball and chain of a legislative code.

The court rule system of judicial administration will not relieve the profession from responsibility to the public for the efficient operation of the courts. It will increase but at the same time justify that responsibility. Nor will it deprive the public of the right to criticize failures in performance and to effectively insist upon satisfactory results. The English public has never ceased to demand from the profession a very high quality of service, and a watchful Parliament has strongly supported public opinion. But the English have never made the cardinal error of taking the regulation of legal procedure out of trained hands and committing it to a political assembly. The function of Parliament has been to pass upon the results produced by the current system of practice, leaving it to legal experts to devise ways and means of improving the product when found unsatisfactory. In this way the public and the profession work together to their mutual advantage. The public, through the press, or through parliamentary commissions created to investigate the working of the courts, frequently points out weaknesses in the administration of justice, and the rule making organization, which is called the Rule Committee, at once takes up the task of improvement.

There is almost an automatic adjustment, and the Rule Committee, representing both bench and bar, works as efficiently to meet the new problems which crowd upon the courts as does the research department of a great manufacturing company to meet the developing demands of modern industry. In view of what England has done, it is inconceivable that American appreciation of expert service will not extend into the field of judicial administration and enable the legal profession to use its skill and experience in rescuing the public from burdens which have become intolerable.

THE PHILOSOPHY OF RULES OF COURT

By Thomas W. Shelton

THERE are few functions more highly technical and scientific than judicial procedure and which, when improperly applied, can become more wicked in results. There are few agencies that demand less simplicity in form and use or that are worse impaired by mystery or technicality. Illustrated in nature, there is no element more useful and of common use and at the same time more deadly than electricity, and none requiring simpler methods of application. The vision of the unthoughtful never reaches or measures the research, concentration and highly perfected program of the philosopher and engineers who came so to understand the science of this necessary danger to mankind as to make it safely its servitor. But once the scientific hand is removed from control, and the influential novitiate occupies the seat of experience and wisdom, it would revert to destructive methods. It is axiomatic that ignorance or inexperience meddling with science always brings its own punishment. So we conclude that the usefulness of the juridical functions may be measured solely by the preparedness and fitness of the agencies in control and responsible for its creation and advancement to suit the day and spirit of the people it is designed to serve.

Daniel Webster's Definition of Justice

It will be helpful to diverge a moment. Lest we underestimate a thing that fixes the limitations of the usefulness of the courts, its sacred function may be best envisioned through the words of Daniel Webster, who said:

> "Justice is the greatest interest of man on earth. It is the ligament which holds civilized beings and civilized nations together. Wherever its temple stands, and so long as it is honored, there is a foundation for social security, general happiness and the improvement and progress of our race. And whoever labors upon this edifice with usefulness and distinction, whoever clears its foundations, strengthens its pillars, adorns its entablatures, or contributes to raise its august dome still higher to the skies, links himself in name, fame and character with that which is, and must be, as durable as the frame of human society."

The Genius of the Juridical Status

Inasmuch as a reasonable and uniform administration of justice depends upon scientific and logical limitations and regulations thrown around the human element of the Tribunals through which it is administered, their juridical status was, is and always will be of first importance. More important than the form of government is the spirit that animates government. Judicial procedure fixes the conditions, the time and manner as to which one may seek the use of the courts; it prevents surprise, oppression and a subsequent attack on the same issue; it makes the humblest man the equal of the strongest, and it confines the oppressive

hand of the government to the orderly method open as well to the humblest citizen. *It thereby becomes the measure of civil liberty and property rights.* Obviously a faulty or technical procedure therefore puts into jeopardy the most sacred rights of citizenship. There can be few more wicked governmental faults than the conscious or ignorant clogging of the sources of justice with an unscientific practice and procedure that ties the hands of the judges and creates uncertainty, delay and expense. As an example that appeals to every seeker after improvement and advancement, the history of the highly technical common law procedure of England, and the substitution therefor of scientific Rules of Court, is the history of the evolution of a great Nation from a people, declared by Macaulay to have been "outcasts and a by-word" following Cromwell's Protectorate. Indeed the practice and procedure of the courts —the manner in which justice is administered, reflects the very genius of government itself and measures the sense of liberty of a people when they submit to the legislative program. Rebellion against an unsatisfactory Legislative juridical program may, therefore, be evidential of a robust intelligence, instead of a symptom of a lack of reverence. For, if a democracy shall exist under the rule of the people, the courts must be prepared to ascertain and administer justice in a satisfactory manner. This is one governmental dereliction as to which no excuse has ever been acceptable to the people. Since justice can only be administered scientifically, not popularly, it must be done by fixed, correlated rules, lest principle be sacrificed for expediency and civil liberty and property rights be based upon a whim, and the necessary popular faith fail from lack of confidence and respect.

Attitude of Legislators to Judicature

Unfortunately, an understanding of the mechanics of the courts is not within the limitations of untrained laymen any more than a knowledge of chemistry or medicine. They can find relief only through protest; by following the lead of their judges and lawyers, or by petition to the legislative representatives they have selected. Therefore, the legislative bodies that create the machinery of the courts, and necessarily control the manner they may function, cannot logically be omitted from consideration. Said John Stuart Mill, "There is hardly any kind of intellectual work which so much needs to be done, not only by experienced and exercised minds, but by minds trained to the task through long and laborious study, as the business of making laws." Organized society has no more dangerous enemy than a legislative incapacity to distinguish between personal pride of opinion and the general welfare. The courts are the worst sufferers from this false conception of representative democracy, through the presence of highly intelligent reactionaries or poorly prepared lawyers in legislative bodies. Unhappily it is in the power of a few such men to prevent all advancement. "No man is so merciless as he who, under a strong self-delusion, confounds his antipathies with his duties."

Congress Must Emancipate the Courts

Some fourteen years ago Hon. Reuben O. Moon of Philadelphia, then Chairman of the Judiciary Committee of the House of Representatives, in a letter to the writer, deplored the then hopelessness of juridical remedial legislation because of a *"lack of trust by Congress in the courts."* That wise statesman might have stood in the shoes of his own great James Wilson, who, with Madison, predicted that Congress might eventually "absorb the judicial power in its vortex." It is well that a Pennsylvanian, not quite a century and a half afterwards, should have observed the usurpation and join in giving the alarm to a complacent Bench and Bar and people. Exception has been taken to this indictment by but few persons. The answer is that the power to direct the manner of doing a thing is the power to control the result, and needs no argument in support. The usurpation has become complete. It is through this means that the American people are receiving *legislative* and *not judicial justice*. The common law conception of a trial that the Founders adopted is well-nigh destroyed in America. The judge has become the agent of the Legislative Department, to execute its whims. Viewed from a practical standpoint, a board of directors of a railroad might as well attempt to operate a locomotive, instead of simply furnishing an expert mechanic with a road and a locomotive and hold him responsible.

Basic Facts

There are at least six self-evident facts lying at the base of a successful administration of justice that some legislators seem to ignore. (1) It is axiomatic that directness and simplicity are the keynotes of republican forms of government and conditions precedent to the usefulness of every governmental function; (2) Courts are made possible by the trinity of respect, faith and obedience. Weaken any one of these elements and their usefulness is impaired. Fully destroy any one of them and their usefulness is destroyed; (3) No agency of a representative government can function usefully that fails to touch the popular life, that shrouds its working in mystery, or that renders doubtful its ends by subtlety or technicality; (4) Even though they were highly prepared, the time is not at the disposal of Congress to attend to the details of the mechanics of the courts; (5) That Congress has a personal and selfish interest in developing and maintaining the courts in the highest state of efficiency, to the end that the laws they enact may be suitably administered, for a law is no better and no worse than the manner in which it is administered. The courts may be compared to the pipes that convey water into a city. It matters not with how much pure and wholesome water a reservoir may be supplied, the quantity and quality actually received by the people is measured absolutely by the condition of the pipes through which it is conveyed. If they be clogged or fouled or insufficient, so will the supply actually reaching the public be unhealthful, unsanitary and insufficient; (6) The executive and legislative departments of government could cease their activities for a given time without other harm than inconvenience, but should the courts cease to function at all, anarchy would follow—might and not right would be the measure of civil liberty and property rights.

The Development

The public first rebelled and followed the misinformed but lovable Roosevelt in his advocacy of "recall of judges" and "recall of judicial opinions" to such an alarming extent that thoughtful laymen and the judges and lawyers were aroused as never before. Their campaign that followed brought laymen and lawyers closer together than ever before in history and awakened, and in some instances created, a sense of the relation of the citizen to the courts and their lawyers and the courts to the government. They learned the danger of laymen, though as great as Theodore Roosevelt, tinkering with so sacred and scientific a thing as the administration of justice. *But above and beyond all these things, they learned that the Congress and not the lawyers was responsible for the deplorable*

conditions of which they justly complained. There followed an abandonment of the campaign of dangerous heresy that would have totally destroyed the courts, and there developed an adherence to the American Bar Association's program to modernize the courts. Since that day the public has joined with the lawyers in knocking at the doors of Congress.

What Are Rules of Court?

The Principle

We may leave to one side, for the moment, the practical aspect of highly technical work that has to be done only by experts, which has been heretofore adverted to. The *principle* underlying rules of court is the organic one of an equable division of power between the legislative and judicial department of government. It is the very spirit of the Constitution. The program of the American Bar Association proposes to divide all judicial procedure into two classes, viz.; (a) jurisdictional and fundamental matters and general procedure and (b) the rules of practice directing the manner of bringing parties into court and the course of the court thereafter. The first class, of which we shall speak presently, goes to the very foundation of the matter and may aptly be denominated the *legal machine* through which justice is to be administered, as distinguished *from the actual operation thereof*, and lies exclusively with the legislative department of government. It prescribes what the courts may do, who shall be the parties participating, and fixes the rules of evidence and all important and permanent matters of procedure. The second class concerns only the practice, the manner in which these things shall be done, that is, the details of their practical mechanical operation. Concisely stated the first class provides what the courts *may* do, which power should be by the Legislative Department, while the second regulates *how* they shall do it, which should be within the control of the presiding judges and lawyers.

Division Into Classes

The First Class

The Second Class

Out of this has been deduced a plan, which is embodied in a simple statute, that met well nigh universal approval. It vests in the Supreme Court of the United States the same rule-making power over the law side that it has always possessed and exercised over the equity side and in admiralty and bankruptcy, and consolidates equity and law procedure as is the case now in nearly all the states. It is useful and it seems necessary to emphasize that the statute will necessitate no alteration of the present procedure upon any jurisdictional or fundamental matter. Therefore the preparation of a "Practice Act" or "Code," or the revision of a state code is a subject entirely apart.

The Plan

The Senate Judiciary Committee Speaks

It will be helpful at this juncture to permit the Senate Judiciary Committee to answer certain specific objections put forward by Senator Thomas J. Walsh, the learned Senator from Montana. "It is also urged by the opponents of the bill," reported Chairman Cummins, in a favorable report by the Senate Judiciary Committee (Report No. 1174, 69th Cong., 1st Sess., Calendar No. 858, Senate Bill S. 477) that it attempts to vest in the Supreme Court the power to make rules covering limitations of actions, provisional remedies, such as orders of arrest, and attachment and the selection or qualification of jurors, and that rules might be framed which would deal with substantial rights and remedies, in a manner contrary to the public policy of the several States embodied in local statutory law. The Committee is of the opinion that the bill, if passed, would have no such effect. Attention is called to this provision, Sec. 1: *"Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."* In the first place, the power conferred relates to the "forms of process, writs, pleadings, and motions." Clearly, this relates to matters of *form* and does not affect substantial rights or remedies. * * * The Supreme Court said: (in interpreting like words) "This act so far as respects the *writ* is plainly confined to *form*," and it was also held that "modes of process related only to the procedure by which the courts could enforce its process. * * * Limitations of time for the commencement of action and the issuance of writs of attachment or of arrest, or the determination of what shall constitute the qualification of a juror, are matters involving substantive legal and remedial rights effected by the consideration of public policy. Their regulations are clearly solely within the legislative power. It is true they affect remedies, but that does not make them mere procedure, such as a court has power to prescribe. They involve the policy of the law which varies in the different States and are and always have been regulated by legislative act. Neither in England nor in any State of the United States where courts are vested with the rule-making power, has it been assumed that the delegation of that power to them authorizes them to deal with such substantial rights and remedies as those just referred to." *But the great Western Senator complained that this historical interpretation of the law did not apply to States having Code procedure* and Senator Cummins' committee report answered him: "But that fact has no bearing at all upon the question we are considering, and for two reasons, viz,. (1) In a code of procedure there is no necessity for differentiating between practice or procedure, on the one hand, and substantive rights and remedies on the other; and (2) It has been found convenient to embody in a single book or manual all matters relating to actions at law or in equity, whether they relate merely to practice or to rights and remedies of a substantive character. The New York Code of Civil Procedure is a glaring instance of this method of codification. Before its recent revision it contained a multitude of such provisions." He instances Lord Campbell's Act, provisions defining causes for libel and slander, annullment of marriage and nuisances. He then points out the Commission appointed to modernize the New York practice and procedure and said: "They (the Commission) proposed to embody in a code (1) a short practice act embodying provisions relating to procedure (2) rules to be ultimately under the control of the courts relating to the details of practice, and (3) provisions as to substantive law; and among the latter was (a) an evidence law, (b) a costs, fees, disbursement and interest law, (c) a civil rights law, in which were embodied the provisions relating to limitations and abatement of actions, (d) orders of arrest, and (e) attachments. In relation to limitation of action and abatement, arrest, and attachment, the board stated that the matter is all of a substantive character and defines or limits certain civil rights * * * using that term in its broad sense." He then quotes to show that "in the English jurisprudence similar matter is found in independent statutes and not in the Judicature Acts or the rules of court." As to attachments, "they embody substantive law. * * * They relate to important matters of substantive right that should be regulated by the legislature and not by the courts." The same doctrine applies to juries. But he concludes that the proposed statute (S. 477; Sen. Calendar No. 585;

H. R. 419) expressly provides that "the substantive rights of any litigant" shall not be affected and all these things now and always have been considered 'substantive rights' at common law, in contemporary England and in every State of the United States." The learned Senator might well have called attention to the same condition of law in the Equity, Bankruptcy and Admiralty courts of America, where rules of court have always prevailed. In justice to American judges it ought to be said that the danger of a judicial reversion of these longstanding principles is highly imaginary even in the absence of the *express prohibition in the proposed statute.*

The Benefits To Be Derived

It will be helpful to repeat here the benefits to be derived by rules of court, viz.: (1) a modernized, simplified, scientific, correlated system of federal procedure; (2) the improvement of state court procedure through the adoption of the federal system as a model; (3) the possibility and probability of state uniformity through the same course; (4) the institution of court rules in lieu of the statutory or code practice, the common law procedure or the common law procedure modified by statute; (5) the foundation of fixed interstate judicial relations, as permanent and correlated as interstate commercial relations; (6) the certainty of immediately detecting an imperfection and the promptness with which it can be corrected; (7) the doing away with the long time now necessary for the simplest relief at the hands of Congress, because of the multitude of other business pressing for attention upon that body; (8) the doing away with the force of law now inherent in every procedural statute and the substitution therefor of a system of flexible rules, not liable to reversible error, if justice be done by the judgment entered; (9) it is the only way that nation-wide uniformity is possible, and yet not compulsory, the psychology of which is important where State pride is an element.

What Rules of Court Mean to Congress

In order to set down what Rules of Court mean to Congress let us review some of the results: (1) Statesmen would be instantly relieved of what must be a heavy burden of labor; (2) there would follow an assurance of the proper administration of the laws they enact through a cheerful cooperation of the Bench and Bar; (3) there would result a shifting of the sacred responsibility to the judges and the lawyers without the loss of eventual control by Congress, for it could promptly take back the power it had given; (4) there would be a happy response to a popular demand, for every State Bar Association, the American Bar Association and all the great National civic and commercial organizations have endorsed and demanded it; and (5) there would be a concrete evidence of the intention of Congress to cooperate with its coordinate department of government that would inspire a new faith in the people.

Progress Is Guaranteed

To the student and the thoughtful man rules of court are the key that will unlock the door to a new era of scientific judicial relations. There will be a unification of equity and law procedure. It will set the lawyers free to perfect the machinery of the courts for which they are held solely responsible by laymen. It is the principle adopted by England more than fifty years ago and has given to that great Nation an unquestioned primacy in the administration of justice. The united bench and bar will cooperate in first constructing and then in gradually perfecting a simple, correlated, scientific system of rules of procedure and practice, in lieu of the present complicated "Federal Practice," the effort to elucidate which has called for more costly and ponderous text books than any other legal subject except corporations. It is proposed that this system of rules shall embrace all the merits and none of the vices of both the "common law" and "code" pleading. This is really the crux of the plan, for judicature would then *command the aid and sympathy of the lawyers, instead of an enforced hostility* as is now the case under the statutes. Moreover, the criticisms of laymen and the Press would be directed in a concrete and harmless manner to a personally responsible and responsive agency, ready and anxious to afford instant relief against procedural hardships. The judge would solve procedural difficulties by seeing to it that the case is brought speedily to issue on its merits through timely amendments to the pleadings as recommended or as may appear necessary. All procedural difficulties would be cleared up in advance of the trial, thus saving the time of the juries. This is the way it has always been done in admiralty and bankruptcy and is now done in equity, and no reason has been shown why it should not also be done on the law side. It will set the judges and lawyers free to perform their obvious and sacred duty.

The Psychology of Rules of Court

More important yet is the psychological aspect, that cannot safely be ignored where success depends upon the human equation, such as the administration of the law. The sense of responsibility proposed to be confided in them and the judges will awaken a new and unselfish interest on the part of the lawyers that will assure their best efforts. Personal pride will play an important part in inducing them to support and maintain the new régime that would owe its existence and gradual perfection in a large measure to the aid contributed by them. *This is really the crux of the whole scheme.* Moreover, it will give to the people the benefit of the advice of their lawyers and will guide their criticism in a harmless manner to a personally responsible and responsive agency. Lawyers will be transformed from the hostile critics, that they now are forced to be, into the militant, helpful supporters that they should and will be. It will go out of fashion for them to pick flaws, even if it could then be considered ethical to do so. That thought, impressed many times upon the Bar, cannot be too strongly and too often stressed. The whole scheme revolves around it.

The Obverse Portrayed

Let us set over against this status its obverse, which is the exclusive legislative control that now exists in the Federal courts. With the Congress prescribing the most trifling details and disregarding for long periods the improvements suggested by Bar Associations, there is nothing for the helpless judge and lawyer to do but to submit and follow as best they may, regardless of the suffering of litigants. This they have done nigh unto half a century, but not without loss of prestige; not without a loss of popular confidence in the courts and lawyers, and not without the temporary lodgment of certain dangerous doctrine in the hearts of the people, to which reference has been made. That resentment as well as a critical mental attitude should be manifested against this involuntary bondage is characteristically American. Let us repeat that Congress must set the judges and lawyers free to modernize the courts.

The Root of the Trouble With the Courts

In its final analysis, the real trouble with the courts

is due to the fact that coordination has been absolutely destroyed by exclusive legislative control. The prediction of James Wilson of Pennsylvania and James Madison of Virginia, joined in by the entire Constitutional Convention at Philadelphia has been vindicated. The Congress has "swallowed the courts in its vortex." The remedy is a return to the spirit of the Constitution as expressed by the Founders—a due balance of power between the legislative and judicial department of government—which is the function of Rules of Court.

THE RULE-MAKING POWER

BY CHARLES S. CUSHING

SO much has been written about the rule making power of the Courts that the development of anything new on the subject seems unlikely, but the presentation of the following facts and comparisons may at least savor of novelty.

During the long history of English Law, Parliament has at no time attempted to enact a full legislative code of procedure. In our country three-quarters of a century ago David Dudley Field was impressed with the possibility of legislative control of Court procedure.

The presence in California of his distinguished brother, Stephen J. Field, and the latter's great influence, made this state a fertile field in which to plant the new ideas. I shall address myself to some of the legislative enactments in California respecting civil procedure.

The first Legislature (1850) adopted a Civil Practice Act and a Probate Act and on March 11, 1872, the Legislature enacted a full Code of Civil Procedure and ten days later enacted, in substance, the famous David Dudley Field Civil Code. The feelings, and some of the reasoning, of Mr. Field on the subject are illustrated by the following telegram sent by him to the Legislature of California:

"New York, March 18, 1872.

"All honor to you for your great work accomplished! It will be the boast of California that, first of English-speaking States, she set the example of written laws as the necessary complement of a written Constitution for a free people.

"DAVID DUDLEY FIELD."

These codes have been adopted, in whole or in part in states and territories west of the Mississippi and have strongly influenced the jurisprudence of our country.

We have, then, the spectacle of one great branch of our government having to conduct our Courts by methods at all times limited and controlled by another great branch, the Legislature, which is by no means as well advised as to the needs of the situation as are the Courts.

The Code of Civil Procedure of California comprises about 2,100 sections. It goes into great detail, resulting in a constant demand for amendment. At the last five sessions of the Legislature, if we count each separate section added or amended separately, this Code has been amended to the following extent; Session of 1917, 54 times; Session of 1919, 88 times; Session of 1921, 117 times; Session of 1923, 49 times; Session of 1925, 32 times; thus 340 amendments have been made during the last ten years.

The Constitution and laws of California permit the Supreme Court and Courts of Record to adopt rules for their government *not inconsistent with law.* Constitution, Art. VI, Sec. 4, C. C. P. Sec. 129-130. The control and supervision of the entire matter is thus with the Legislature.

Let us consider how this question has been treated in the same state in the creation of the important Boards brought into being in recent years and exercising quasi-judicial powers.

The Corporate Securities Act, covering the important function of authorizing the issuance of a great mass of securities, provides (in Section 4 thereof) as follows:

> "The Commissioner shall have the power to establish such rules and regulations as may be reasonable or necessary to carry out the purposes and provisions of this act."

The Public Utilities Act, providing for the organization of a Commission to regulate such utilities, provides, Section 53;

> "Rules of procedure. All hearings, investigations and proceedings shall be governed by this act and by rules of practice and procedure to be adopted by the commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule or regulation made, approved or confirmed by the commission."

The Workmen's Compensation Act, Section 57, provides that the Commission shall have power and authority;

> "(1) To adopt reasonable and proper rules of practice and procedure; * * * * (6) To regulate and prescribe the nature and extent of the proofs and evidence."

The only purpose of conferring on these Commissions these important powers, including, as we have seen in two instances, the power to determine what is evidence itself, is to meet the demand that action be prompt, direct and free from technicalities.

We thus see that while these plenary powers are conferred upon Commissions, like powers are refused to the Courts, although the latter are bodies of a more permanent character and are almost universally presided over by Judges of greater learning and experience than the members of the Commissions.

The Commissions must avoid technicalities and are allowed to determine what is evidence itself. The Courts must keep to a beaten path of procedure, while hundreds of sections define what is evidence for them.

Examples of this nature might be multiplied. The action of the Legislature in reference to the Commissions represents the spirit of this age and the desire for promptness and directness. The restrictions on the Courts are those of a by-gone era and, I submit, have been discredited by experience. It seems quite apparent that the procedure of a tribunal should be regulated by those having responsibility for its actions and success. Let us then remove this power from the Legislature and place it where it belongs, in the Courts.

COURT RULES FOR THE REGULATION OF PROCEDURE IN THE FEDERAL COURTS

By E. W. Hinton

PROCEDURE in the federal courts in actions at law might conceivably be regulated by any one of three possible systems:

1. Strict conformity to the local state practice.

2. General conformity to the state practice, except as otherwise provided by various federal statutes.

3. Uniform federal rules without regard to the local practice.

Each system has its own possible advantages and disadvantages.

The first plan offers this theoretical advantage, that the ordinary practitioner need only know one system of procedure, that of his state which would serve him equally well in the federal courts sitting in that state.

Such a plan seems to have been adopted as a temporary expedient under the Process Act of 1789.

As a matter of fact, strict conformity was impossible because of inherent differences between state and federal organization. For example, state rules of venue depending on a county organization had no place in courts which took no account of county lines. Juries could not be selected in the same way, because the United States lacked the necessary organization, such as county courts or county jury commissioners and the like. The strict conformity plan proved unworkable, and there is apparently no demand for an attempt to return to it. Even under the Process Act of 1792, the Supreme Court was given power to make rules changing the practice.

Then came the second system, the Conformity Act of 1872, under which the federal courts are operating at present. According to the Conformity Act, procedure of the federal courts is to conform to the state practice as near as may be, except as Congress has otherwise provided. Under this scheme some sort of a system has grown up, though varying substantially from the practice of the States in many particulars. Congress has legislated from time to time on some phase of procedure, and needless perplexing questions arise as to the application of state rules. For example, the Act of Congress providing for trials with a jury waived makes no provision for rulings on propositions of law as may be done under the practice of some of the states. There is much confusion as to whether the state practice is applicable.[1] The lawyer does find it necessary to be familiar with two more or less variant systems of procedure.

Accordingly the American Bar Association has been committed for some years to a proposal for a uniform system of rules for the federal practice at law for the same reason that uniform rules have been found desirable for the federal practice in equity.

Since the practitioner must learn a system of federal procedure, different substantially from the state practice, the advantages of a uniform federal system are sufficiently obvious. If uniform federal procedure is ever attained, it must come through a code of rules enacted by Congress, or through rules adopted by the Supreme Court of the United States under authority granted by Congress. The practical problem then is whether rules of court are preferable to a statutory code or practice act.

Experience under the New York Code and those based on it has demonstrated that little progress is likely to result from a statutory system of procedure. Legislatures have neither the time nor the training to work out and formulate a simple and satisfactory set of rules to govern the conduct of a law suit. The result is that under legislative codes in operation the practice has grown more complicated and technical. The time of the court is taken up in construing language that has no definite meaning, or else the court is hampered by language that is rigid and fixed. And in the end the rules are not what the legislature may have intended but what the courts have made out of the language of the statute by the slow process of construction.

If the rules thus evolved work badly—if they hinder rather than help the administration of the law, the remedy must come from without. Congress must be asked to amend or repeal the statute.

Since the power of construction puts the operation and effect of statutory rules in the hands of the courts in any event, there is no reason to fear entrusting them with the power to make rules in advance.

The judges are certainly better fitted by training and experience than any legislative body to formulate rules of procedure. They may be expected to formulate rules involving fewer difficulties of construction. And if a given rule proves unsatisfactory, the remedy is simple and speedy. The same court that made it can repeal it or amend it. This is not an untried experiment in the United States.

Since 1822 the court has had and exercised the power to make rules governing the equity practice.

Under the equity rules the practice has become fairly simple as compared with that in vogue in the time of Lord Hardwicke.

While the practice at law under statutory regulation is in some respects more complicated than that of the time of Lord Mansfield.

England struggled under an archaic procedure until rules of court under the Judicature Act produced the most effective system that has yet been tried. The writer is not advocating the adoption of the English rules. Many of them are probably not adapted to our judicial organization or to our conditions.

But in order to obtain a more effective uniform system the court should have the power to adopt such rules as may be best suited to that end.

1. The writer called attention to the confusion on this point in a comment in 21 Ill. Law Review 161, on the dictum in *Fleishman Construction Co.* v. *United States*, 46 Sup. Ct. 284.

The writer also noted the confusion as to whether the federal courts were required to follow the state practice as to the method of attacking the truth of the return of service of process, in comment on *Joseph Frachman Co.* v. *Lloyds*, 7 Fed. (2nd) 630, in 20 Ill. Law Review, 827.

THE RULE-MAKING POWER

By Frank W. Grinnel

THE problem as to the extent to which the rule-making power of the courts in regard to procedure and practice can, and should, be extended, as a practical matter, may differ in various jurisdictions in accordance with the local conditions, traditions, and prejudices or lack of them. Of course, the study of the administrative problems of the courts with a view to adjusting procedure and practice to modern conditions has become an economic necessity in this country for reasons which Dean Pound and others have pointed out for some years. But the extremely gradual growth of the movement for such study in England, as described by Professor Sunderland in his articles in the "Chicago Tribune" (reprinted in the "Massachusetts Law Quarterly" for November, 1926) and also in his article in the "Harvard Law Review" for April, 1926, seems to me to emphasize the following sentence in the article last referred to:

> "The judicial decentralization based upon the independence of our state governments develops a definite interstate competition in procedural law. All our states have similar judicial problems which are met in different ways. Successes in one state are imitated in others, failures are avoided. The probability of the accidental emergence of an improvement in procedure is multiplied by forty-eight, and once having appeared in any state it becomes an object of interest in all the rest. Although there can be no competition among individual lawyers, we have a very effective competition among systems and rules of practice. The whole country is a laboratory in which experiments are being actively conducted. Nothing can halt this stimulating process except the standardizing of procedure through uniform state legislation. It is sincerely to be hoped that this movement will not extend into the procedural field. It will destroy the most promising possibility for the general improvement of American procedure."

Along the same line, the Judicial Council of Massachusetts said in its first report and repeated in its second report that, "We believe attempts to make court procedure uniform in all states to be a mistake and one which is likely to obstruct progress," because, as stated in its first report, "Court procedure seems to us peculiarly" a matter of "local experiment in convenience and effectiveness."

These suggestions apply especially to movements for uniform state laws on the subject. They do not necessarily apply in quite the same way to the proposal before congress to extend the rule-making power of the Supreme Court of the United States to the common law side of the Federal courts, although even with such extended powers, that court might find it practically necessary or expedient to provide for some variations in the rules or practice in the Federal courts in different sections of the country. Congress is such an unwieldly body, for the purpose of dealing with court rules and procedure, that there may be a special reason for transferring to the court the full rule-making power on the law side, in spite of the objections suggested by Senator Walsh of Montana (See Texarkana address U. S. Senate Doc. No. 105 of 69th Congress 1st Session, "Massachusetts Law Quarterly," November, 1926), and by Judge Morton of the Federal District Court of Massachusetts in his address before the Judicial Section of the American Bar Association (See "Massachusetts Law Quarterly" for August, 1925, pp. 7-8).

Aside from these questions of interstate uniformity, there is nothing new in a certain amount of rule-making power for the courts in Massachusetts. In the acts of 1782, c. 9, establishing the Supreme Judicial Court, the legislature inserted the provison—

> *"And it is further enacted,* That the same Supreme Judicial Court shall and may from time to time, make, record and establish all such Rules and Regulations with respect to the admission of attorneys, ordinarily practicing in the said Court, and the creating of Barristers at Law, and all other Rules respecting Modes of Trial, and the Conduct of Business, as the Discretion of the same Court shall dictate. *Provided always,* That such Rules and Regulations be not repugnant to the Laws of the Commonwealth."

In the acts of 1820, c. 79, §7, creating the Court of Common Pleas, the legislature provided,

> "And said Court of Common Pleas shall have power, from time to time, to make and establish all such rules for the entry of actions, filing pleas in abatement, and demurrers to declarations, and for the orderly and well conducting the business thereof, as may be thought proper: *Provided,* the same are not repugnant to the laws, of the Commonwealth" (cf. Rev. St. c. 81, §10 and c. 82, §36, Commissioners' Report, Part III, pp. 12 and 18).

The language of the earlier acts has been somewhat qualified by later statutes, but the present law, G. L. c. 213, §3, still contains quite broad rule-making powers on the law side of the court. Since the equity jurisdiction of the Supreme Judicial Court and the Superior Court was established in 1877 and 1883 in accordance with the "General Principles of Equity Jurisprudence" there has been full rule-making power in equity in the hands of the Supreme Judicial Court subject to any specific statutory provisions of which there are few, and, by the recent act of 1926, c. 138, the Superior Court, which now hears most of the equity cases in the first instance, was given the same full rule-making power in equity as follows: "Procedure, process and practice in equity causes originating in the Superior Court, or transferred thereto from any other Court, shall while in the Superior Court, be regulated by rules made from time to time by that Court."

Our district courts also have a considerable amount of rule-making power (See G. L. c. 218 §43 and 50) and the practice in the Land Court, which was created in 1898, was by the statute left very largely to the judges to develop in accordance with the practical demands of the work under the new system, which has been one of the constructive chapters in our judicial history since 1898.

Turning now to the *exercise* of the rule-making power, experience has shown that some courts have used this power more frequently and more effectively than others. Occasionally the legislature passes an act which specifically requires the details to be worked

out by rules, as in the case of the small claims procedure, for the informal hearing of claims not exceeding thirty-five dollars, which was provided for in all the district courts of the state in 1920 on the recommendation of the Judicature Commission. The act provided that a majority of the justices of the district courts should make uniform rules for this procedure and that the Municipal Court of the City of Boston should make rules for similar procedure in that court. This was done and effectively done, as may be seen in the copy of the rules with explanatory notes in the back of "Massachusetts Law Quarterly" for January, 1921.

The Municipal Court of the City of Boston has also experimented from time to time with various rules, the latest one being a provision for a speedy cause list on which cases may be placed for informal hearing with all technicalities waived. This rule is reprinted in the second report of the Judicial Council of Massachusetts, pages 12-13 (See Massachusetts Law Quarterly for December, 1926). Occasionally experiments with rules have been tried by other courts but, on the whole, the rule-making power has not been used as much as, perhaps, might have been expected. There are doubtless various reasons for this. In the first place, the general scope of the power and the possible qualifying effect of some of the words and phrases used in the statute are not as clear as they might be, or, apparently, as clear as they used to be in the earlier statute already quoted. In the second place, the judges, who are busy with their other work and who have grown up with "conservative" lack of familiarity with the idea of progress through experiments under the rule-making power, have made little use of that power. The bar, which is also "conservative" in such respects, has, partly in consequence of this fact, applied to the legislature when changes were desired, sometimes with fortunate and sometimes with unfortunate results.

This habit of going to the legislature with such matters is, of course, common in other states and is doubtless often unfortunate in its results. But the Judicature Commission of Massachusetts in its second report (House Doc. 1205 of 1921, p. 30) said, "We are convinced, however, that we are more fortunate than the people of many other states in the judgment shown by Massachusetts legislators in regard to problems relating to the courts, not only in what they have done, but what they have not done." Thus the legislature in 1851 refrained from the then current enthusiasm for general codification and followed the advice of Benjamin R. Curtis and his associate commissioners on the practice act in retaining the simple outlines of common law procedure with technicalities omitted.

At intervals of ten or fifteen years, special committees or commissions have been appointed to consider the courts and practice and procedure and advise the legislature. In the intervals between such commissions, the judiciary committee has acted with considerable self-restraint on the many individual proposals for change which were submitted to them. A list of the reports of special commissions from 1798 to 1920 appears in Appendix C of the report of the Judicature Commission already referred to.

It was the lack of any established "clearing house" of suggestions and of continuous responsible study of the judicial system and the operation of its various parts in relation to each other, which led the Judicature Commisson to recommend the creation of a judicial council composed both of judges and lawyers for such continuous study, as an advisory body.

This story of the development of the judicial council idea in Massachusetts, with its historical background, has been told, at some length, because it seems to me to have an important bearing on the problem of the extension of the rule-making power in any particular jurisdiction, including the Federal courts.

The Judicial Council Idea and Its Relation to Rule-Making Power

Under the leadership of Chief Justice Taft, congress provided several years ago for a judicial conference of Federal judges. This was an important step in the gradual progress toward a closer study of practice in the Federal courts. To some extent it carried out the idea of a better-developed judicial council, which is, simply, in substance, that if representative men engaged in administering different parts of a great organization get together and talk things over they will all learn something sooner or later and make some helpful suggestions. That is the basic idea of a judicial council. Everybody knows, if he stops to think about it, that it must be as sound an idea as applied to the courts as it is outside of the courts in other affairs.

Now the weakness or, perhaps, it should be said, the limitation, of the Federal judicial conference referred to, is that it is composed entirely of judges and that great part of the judicial system of the United States,—the Federal bar—has no direct representation in the conference.

That an advisory "clearing house" of ideas is as much needed by congress and by the Federal courts as it is in any state seems to me to be unquestionable. President Coolidge approached this idea in his message to congress in December, 1923, when he said, "A commission of Federal judges and lawyers should be created to recommend legislation by which the procedure in the Federal trial courts may be simplified and regulated by rules of court rather than by statute; such rules to be submitted to the congress and to be in force until annulled or modified by the congress." The trouble with this recommendation is that it does not go far enough. The Supreme Court of the United States, or any other court which is, or may be in future, charged with the making of rules, either in equity or at law, for the conduct of modern business, needs, and will need, the assistance, in the form of suggestion and criticism, of a conference of judges and members of the bar with some continuity of organization and study,—such a continuous body as has been given the name "Judicial Council."

The suggestion of President Coolidge was sound in so far as it included representation of the bar, but what is needed is a more permanent body. As I see it, at present, it might be a mistake to add the burden of responsibility to the Supreme Court of the United States of making general rules governing all the Federal district courts without providing them with the assistance of such an advisory body as a judicial council containing representation from the bar. It must not be forgotten that the proposal to saddle the responsibility, not only of rule-making *action* but of most of the preliminary rule-making *thinking*, on to busy courts of men who are sometimes well advanced in years, is not very promising as a business proposition. Just as the bench and the bar of the country need the thinking and the research of law schools and law faculties in the background, so the bench, or the legislatures, in the exercise of rule-making power need

an intermediate clearing house of suggestions to share some of the labor and, perhaps, to suggest practical methods of adjusting the differences between what may be the excessively conservative instincts of some courts and the possibly academic or theoretical aspects of some of the suggestions that are made. As long as such a body is advisory and is given no powers except to work and report, it can not take itself too seriously because, in order to gain confidence in its work, it must do it in such a way as to satisfy the profession that, on the whole, it has something to contribute which justifies its existence. Its recommendations need not be tried unless they seem worth trying. They would focus attention on questions for discussion by bar association committees and others. The suggestions of such a body, with a reasonable representation from the bar and with the Chief Justice of the Supreme Court of the United States, or some one selected by him, as its chairman, might help a good deal in the course of time.

THE RULE-MAKING POWER OF THE COURTS

By Charles S. Cutting

WHEN one considers the care with which the great departments of our government, both federal and state, are separated, each one of which is, as far as may be, independent of the other, we may well wonder how it ever came about that the legislative and the executive so far trespassed upon the prerogative of the courts as to prescribe the rules relating to the pleading, practice and procedure of the courts themselves. With great care, the courts have, as a rule, avoided any interference with the independent action of the legislative and executive departments, but the legislature, basing its action, apparently upon usage long continued, is constantly interfering with the practice and procedure of the courts. In some way it seems to be considered that a body, purely legislative in its nature, can best know and prescribe how a court shall function. It might well be asked whether the legislature would regard a like interference with its method of procedure by the courts as calmly as the courts have seemed to contemplate these procedural statutes.

There has been a growing sentiment in the State of Illinois among the members of the Bar in favor of the practice which has been adopted in England and elsewhere, under which rules of court have been substituted for statutes relative to practice. And this in spite of the fact that occasionally one hears the objection that to control procedure by rules of court is but to slavishly copy an English precedent, as if, indeed, our language and our system of jurisprudence, especially the common law, were not borrowed from England.

In 1922 a Constitutional Convention of the State of Illinois promulgated for the consideration of voters a judicial department article, based upon the theory of the independence of the court, and containing this section:

> "The Supreme Court shall have exclusive power to prescribe rules of pleading, practice and procedure in all courts, but rules not inconsistent therewith may be prescribed respectively by other courts of record."

This provision was not adopted without strenuous opposition from certain lawyers who were members of that Convention, who with the conservatism characteristic of our profession, regarded any innovation with suspicion and distrust and worked, so far as they were able, against the adoption of the section. In order to placate them, there was added another sentence to the section, as follows:

> "Any rule of pleading, practice or procedure may be set aside by the General Assembly by a special law limited to that purpose."

Just why a certain portion of the community feared the action of a Supreme Court in determining the rules by which it should administer justice and yet did not fear the action of the legislature, in the main notoriously unfit to determine questions of that character, has never been explained.

In the address to the people, which accompanied the new Constitution, the Convention adopted the following:

> "Under the previous constitutions it has been the custom for the legislature to pass laws prescribing the practice, pleading and procedure of courts. This has long been recognized as of doubtful value. While the practice has perhaps not been inadequate in the less thickly settled communities, it has not lent itself to the expeditious dispatch of business in the larger cities and the result has been that the courts have been clogged and litigants have been sometimes so delayed in securing their rghts that the delay has amounted to a denial of justice. Under the proposed constitution, the supreme court will have the power to prescribe the rules of pleading, practice and procedure and with its experience, passing, as it must, daily upon the records of the trials made in the lower courts, it should be best able to judge of the changes that can advantageously be made for the speedy and sure administration of justice.
>
> "Indeed it is arguable that the making of laws by the general assembly regulating the practice in courts is an invasion of the power of the courts and violative of the constitutional division of governmental powers into the three divisions of executive, legislative and judicial."

This Constitution was not adopted by the people, but it failed for reasons not connected with the judicial article. The Supreme Court of Illinois has been rather jealous of its prerogatives in most matters. It has repeatedly held that the rule-making power is purely judicial and not legislative, although it has never, so far as the writer knows, disregarded a statute on that subject except in the matter of the admission of applicants to the Bar.

In the case of *In re Day*, 181 Ill. 73, the court held unconstitutional as interference by the legislature with a purely judicial matter, a statute relative to the admission of applicants to the Bar. And since that time all matters pertaining to such admission have been exclusively within the control of the Supreme Court of the State. It would be but a single step further for our Supreme Court to treat statutes attempting to regulate practice, pleading and procedure in the same manner and promulgate its own rules therefor.

It is hoped, however, that there may be embodied

either by amendment or in some new constitution, a provision which restores to the courts the original rule-making power which they possessed in their early history.

The patience of one who has had much to do with practice and procedure is sorely tried by the lack of active interest displayed by a considerable portion of the Bar as well as by the opposition to this vital reform by a smaller part thereof. Two reasons, among many, should prevail over all opposition whether it be inert or active:

(1) The unquestioned superiority of the courts in legal matters both in learning and experience.

(2) The facility with which the courts may create, amend or abrogate the rules of procedure. Contrast this with the slow legislative method of acting, with biennial sessions and much business of a different character.

REGULATING PROCEDURAL DETAILS BY RULES OF COURT

By ROSCOE POUND

ONE does not need to rely upon *a priori* argument in advocating regulation of the details of procedure by rules of court. He may vouch wide and long-continued experience. In the United States this plan has been in force in the equity and admiralty jurisdiction of the federal courts since 1842, it has been in operation in bankruptcy since 1898, and in copyright cases since 1909. It has been adopted uniformly in the setting up of administrative boards and commissions, state and federal. It has been in force with respect to procedure in the English courts since 1875, and now obtains with respect to the procedure of courts in Ireland, Canada, Australia and British India. Thus no untried experiment is advocated. Indeed in eighty years of American experience of legislative prescribing of procedural detail that method has led to results of which there is universal complaint, whereas the regulation of procedure by rules of court has brought about good results in all English-speaking lands.

On another occasion I have explained how it came about that for a time in England legislative prescribing of the details of procedure threatened to supersede the rule-making power of the common-law courts, and in the United States, without attempting to use the common-law powers of our courts as a means of overhauling the cumbrous, involved, over-refined procedure which we inherited from the eighteenth century, we turned to legislative dictation of details which ought to be left to the courts (The Rule-Making Power of the Courts, American Bar Association Journal, 1926, p. 599).

In the fore part of the nineteenth century it was natural to turn to the legislature for everything. Statutes seemed to be the solution of all political and legal difficulties. Also over-conservatism of the legal profession in some measure compelled legislation. As we look back, we see that the old common-law procedure could not stand unmodified. Overhauling was necessary and inevitable. Persistent resistance of the leaders of the profession, who should have taken the lead in and directed the reform, resulted in leaving to legislation what could have been done much better by the courts. Moreover, the bar of that time was apprentice-trained, and that means that it was trained primarily in the details of local procedure. Hence it thought of legal questions in terms of procedure, not in terms of the substantive law, and so conceived, as many do today, that the details of procedure must be left to legislation if the separation of powers is to be maintained and the substantive law is to be under the control of the legislative department of the government.

Perhaps one ought to dwell a bit upon this last point. In the report of the Board of Statutory Consolidation of the State of New York on a plan for the simplification of the civil practice in the courts of the state (1912), page 27, the Board says that the English system "is not in harmony with the spirit of our democratic institutions and the principle of checks and balances which is necessary to the preservation of departmental equilibrium under our republican form of government." It might be said in passing that this system has had no such effect when applied to procedure in equity or in admiralty in the federal courts, and that procedure in bankruptcy and in copyright cases involves the same relations of procedural rules to substantive rights or property which obtain in the case of procedure at law. But a conclusive answer to such ideas is to be found in our recent experience of claims that the separation of powers or the Constitution require that the legislature prescribe details of administrative procedure. In his eulogy on Chief Justice White, Chief Justice Taft puts this well:

> "The Interstate Commerce Commission was authorized to exercise powers the conferring of which by Congress would have been, perhaps, thought in the earlier years of the Republic to violate the rule that no legislative power can be delegated. But the inevitable progress and exigencies of government and the utter inability of Congress to give the time and attention indispensable to the exercise of these powers in detail forced the modification of the rule. Similar necessity caused Congress to create other bodies with analogous relations to the existing legislative, executive, and judicial machinery of the Federal Government, and these in due course came under the examination of this court. Here was a new field of administrative law which needed a knowledge of government and an experienced understanding of our institutions safely to define and declare. The pioneer work of Chief Justice White in this field entitles him to the gratitude of his countrymen." (257 U. S. xxv-xxvi.)

In other words, a theoretically exact, rigid, analytical separation of powers, such as the report of the New York Board assumes, is not possible in so practical a matter as government. If exercise of the rule-making power by the courts is permissible under the Constitution, we need have no fear that it will disturb the balance of our government, nor that it will be at variance with democratic institutions. This power was exercised by the Supreme Court of the United States at the very beginning of our federal judicial history. In 2 Dallas, page 411, we read of the following significant

incident in the newly constituted Supreme Court of the United States.

"The Attorney General having moved for information, relative to the system of practice by which the Attorneys and Counsellors of this court shall regulate themselves, and of the place in which rules in causes here depending shall be obtained, The Chief Justice, at a subsequent day, stated, that The Court considers the practice of the courts of *King's Bench* and *Chancery* in *England*, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein, as circumstances may render necessary."

If wide powers of rule-making, not merely in procedure but even in working out of the details of substantive law, can be given to administrative boards and commissions, as is done every day, without disturbance of the balance of our government, and without impairing democratic institutions, we need not hesitate to restore the rule-making power of the courts, a power which all common-law courts possessed and exercised when our constitutions were adopted. Indeed, the argument of the New York Board if carried out would call upon us to overthrow the doctrine of precedents whereby in finding the grounds of decision for one case the tribunal in effect makes a rule for future cases. It is significant that when the last Constitutional Convention was sitting in New York, there actually was a proposal urged by some good lawyers on this very ground for an express constitutional provision abrogating the doctrine of precedents. But that doctrine was part of our inherited legal and judicial system presupposed by our constitutions. So likewise the rule-making power of the courts with respect to procedure was a part of that system.

One need not argue the objections to the system of regulating details of procedure through codes of procedure and practice acts, a system, be it remembered, which is an exotic in common-law jurisdictions and grew up in this country after 1847. Suffice it to quote the statement of the New York Board of Statutory Consolidation in the report already referred to:

"The present code system in this state of regulating details of practice by statute has been tried and has so lamentably failed and has been condemned in such unmeasured terms, that it may be passed by without further comment."

This, be it noted, comes from the pioneer jurisdiction in legislative regulation of details of procedure.

On the other hand, the advantages of developing details of procedure by rules of court rather than by minute legislation are clear. In the first place, it is impossible to anticipate in advance the exact workings of a detailed rule of practice. It is inevitable that change and adaptation to the exigencies of judicial administration will be required. No one is so well qualified as the judiciary to determine what experience requires and how rules are actually working. The judges have experience of a wide range of cases involving every phase of the application and interpretation of rules, whereas members of judiciary committees are apt to judge solely with reference to the exigencies of some particular case in which some lawyer has been deeply interested. Secondly, it is possible to bring the opinion of the bar with respect to the working of a rule to the attention of the court and to obtain action from the court in procuring new rules or improving old ones more easily and with better results than where the legislature must be applied to. In most jurisdictions it has proved very difficult to interest legislatures in needed improvements in the details of procedure. There is no particular glory for any legislator in introducing and pushing a measure for amendment of some technical detail of a code of civil procedure or a practice act. Often committees of bar associations are looked upon with suspicion when they come before legislative bodies urging much needed improvements of detail. It would be far different if these committees had to bring their recommendations to the notice, not of a legislative body, but of a judicial council or a court. Small details do not interest the legislature, and in consequence it is almost impossible to correct them. Correction has to come too often through judicial warping of provisions of codes of procedure and practice acts, with the consequence that other provisions are potentially affected, and uncertainty is promoted. Thirdly, too often details in which some one member of the legislature has a personal interest are dealt with by legislation, not always in accord with the real advantages of judicial procedure, while other details much in need of correction remain untouched. Fourthly, there ought to be a possibility of speedy adjustment of details of procedure whenever experience shows that changes are needed. It is only through rules of court that this speedy adjustment can be made.

Above all, however, regulation of procedural details through rules of court has the great advantage that those who make the rules will interpret and apply them. In other words, we may be assured of a sympathetic interpretation and an application in accordance with the intent and purpose of the rule, whereas when procedural details are imposed upon the court by legislation, experience has shown that there is often a difference in the spirit of the rule and the spirit of its interpretation, or even a downright antagonism on the part of the tribunal toward the precept it is called upon to interpret and apply.

Six objections have been urged against restoration of the rule-making power of the courts. First, it has been argued that the evils to be cured are chiefly the product of judicial lawmaking, and that it is not wise to entrust the administration of the remedy to the agency which has produced the condition to be cured. But it cannot be admitted that the difficulties to be met are the result of judicial interpretation of codes and practice acts. Legislation has attempted the impossible. With respect to the substantive law we have never attempted to lay down every detail in advance. Here everyone must concede the courts have done well. The defects of our administration of justice are not with respect to the substantive law where the legislature has left the courts free to do things, but with respect to procedure where too often the courts have been tied down by minute detail.

Secondly, it has been urged that "the bench and bar have not only been hostile to the enactment of legislation changing modes of procedure, but their hostility to new modes of procedure when prescribed has continued and has greatly impeded their beneficial operation." To this objection it may be replied that the attitude of courts toward rules which the courts themselves frame or promulgate is certain to be very different. It is inconceivable that the judges would interpret their own rules in a hostile spirit.

Thirdly, it has been urged that if the judges are given power to regulate procedure by rules of court, the result will be "the adoption of many

rules more suited to their own convenience than to the convenience of litigants and members of the bar and to the prompt and proper transaction of business." But if any judges in the world might be expected to consult their own convenience solely and pay little heed to the members of the bar, it would be the English judges. No suggestion has ever been made that the English rules are made for the convenience of judges at the expense of the convenience of the bar. Certainly American judges have shown no disposition to ride over the bar. On the contrary, they are more likely than is the legislature to give effect to the real sentiments of those who best represent the profession. Thus far our experience has shown that elective judges are more likely to defer to the convenience of the bar at the expense of despatch of public business than to make arbitrary rules for the personal convenience of the bench.

Fourthly, it has been urged both by Mr. Gilbert and by Senator Walsh that in effect regulation of procedure by rules of court would involve "the enactment of a new code of procedure . . . which would require judicial construction . . . for its proper operation, and would plunge us into a state of confusion and uncertainty which it would require many years to remove." I have discussed this objection more than once on other occasions. Suffice it to say that this objection ignores all the progress which has taken place in judicial procedure in the last generation, and forgets that we are living in the twentieth century. Everywhere in the English-speaking world, except in the United States, arbitrary detailed codes of rules, bestrewn with pitfalls and difficult to learn, belong to the past. The way out of the situation in which we alone of English-speaking peoples find ourselves is not through legislative tinkering of codes and practice acts.

Fifthly, it is argued both by Mr. Gilbert and by Senator Walsh that the courts have no time to give to rule-making. It might be said with quite as much truth that the legislature has no time to do what it is expected to do in the way of providing for the details of procedure. One need hardly say that whether procedure is left to the courts or is to be governed by statute, the real work of investigation and of drafting will not be done necessarily by those under whose authority the rules or the statutory provisions are ultimately promulgated. But we may be confident that the courts will be able better than legislators to choose persons competent to do this work of investigation and drafting. Courts will be better able than legislatures to determine the weight that should be given to recommendations or proposals for change. Indeed, the judicial council affords an obvious means of insuring that the courts be enabled to perform a function of this sort if committed to them.

Finally, it is objected that regulation of procedure through rules of court would be unconstitutional. I have argued this point at length in a paper on Regulation of Judicial Procedure by Rules of Court in 10 Illinois Law Review, page 163, and in the paper printed in the American Bar Association Journal for September, 1926, already referred to. Perhaps it is enough to say here that the established criterion as to whether a given power is legislative, or executive, or judicial is to inquire whether that power was exercised by Parliament, Crown or courts at the time when our constitutions were adopted. Applying that criterion (and Chief Justice Taft has conclusively shown why we must apply it, see Ex Parte Grossman, 267 U. S. 87, 108, 109) we need not doubt that a power exercised by the courts at Westminster down to the Revolution, exercised by the highest courts of our states down to the period of detailed codes and practice acts after the middle of the last century, exercised by the Supreme Court of the United States at its very first session, exercised by the Supreme Court of the United States to this day in equity, admiralty, bankruptcy and copyright causes, and committed without question to every new administrative tribunal set up in the last twenty-five years, is entirely compatible with the constitutional separation of powers.

THE RULE-MAKING POWER OF THE COURTS*

BY JOSIAH MARVEL

BY observing the law magazines and the activities of the various Bar Associations throughout the country, it will appear clearly to any one that American lawyers are developing a much keener interest in the Rule-Making Power of the State and Federal Courts. This, I think, is grounded on three things:

1. An increasing desire on the part of the American Bar to do those things that will make for a better administration of justice.

2. A growing consciousness on the part of the Bench and Bar that its members constitute the Judicial Department of Government created to administer justice for all of the people.

3. An increased willingness on the part of the members of this Judicial Department of Government to assume the responsibility placed upon them without leaning upon the Legislative Department of Government for guidance.

This interest, however, has yet a long way to go before a substantial majority of American lawyers are brought into active cooperation in securing the Rule-Making Power for the Courts. It is quite true that there now exists in this country a very considerable power on the part of the Courts to make rules of practice and procedure. Any lawyer can readily perceive the far-reaching effect of the power of the Supreme Court of the United States in promulgating rules in equity, in admiralty and in bankruptcy. In many States the power exists to a greater or less degree and in some few States there have been made recent advances in this direction. This was done in Colorado, 1913; Alabama, 1915; Michigan, 1915; Virginia, 1916; North Dakota, 1919; New Jersey, 1921; Delaware, 1925; Washington, 1926; yet in none of these States has the power been exercised to any very great extent.

On the other hand, we find that more than half of the States have enacted practice acts or codes of procedure led by the adoption of the Field Code in New York in 1848, followed by Missouri, 1849; Cali-

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fornia, 1850; Iowa, 1851; Kentucky, 1851; Minnesota, 1851; Indiana, 1852; Ohio, 1853; Oregon, 1854; Washington, 1854; Nebraska, 1855; Wisconsin, 1856; Kansas, 1859; Nevada, 1860; North Dakota, 1862; South Dakota, 1862; Arizona, 1864; Idaho, 1864; Montana, 1865; Arkansas, 1868; North Carolina, 1868; Wyoming, 1869; South Carolina, 1870; Utah, 1870; Colorado, 1877; Connecticut, 1879; Oklahoma, 1890; New Mexico, 1897; Alaska, 1900; and Porto Rico, 1904; a total of twenty-eight States and two territories. These steps taken during the last seventy-five years in this country show either that the Courts have abdicated their original rule-making power and surrendered it to the Legislative Department of Government, or that the Legislative Department has reached out and appropriated the power regardless of the Court's desire in the matter.

It is interesting to compare the action of the English during practically this same period of time. They began with the Civil Procedure Act of 1833 providing that eight Judges should make rules for the reform of pleading, under which Act was promulgated the Hilary Rules of 1834. The Statute of 1850 gave them a wider power and the Statutes of 1852 and 1854 broadened the powers yet again. The Chancery Amendment Act of 1850 started in the same direction by empowering the Chancellor, with the concurrence of the Master of the Rolls and one of the Vice-Chancellors, to make general rules and orders, which Statute was greatly broadened in 1858, and resulted in the Great Consolidated Orders of 1860.

The progress and success of the Rule-Making Powers of the English Courts of both law and equity, prepared the British people for the Judicature Act of 1873, which went into effect in 1875, starting with a set of rules and creating a Rules Committee composed of eight judges and four lawyers. This Committee may change almost anything in English procedure by giving forty days notice of a proposed new rule or a proposed amendment to an old rule. To be sure either House of Parliament may veto the rule, but neither House has ever exercised this power, indicating conclusively that the English people are satisfied that the administration of justice has been carried on by the English Bench and Bar in a better way than can be devised by the representatives of the people in Parliament.

It is strange indeed that two peoples tracing their law and their legal procedure to the same source, should so diverge in the last generation in their manner of administering justice. On the one hand we have English Rules of Practice and Procedure made flexible and adjustable to the end that they may be competent and dutiful handmaidens to the substantive rights of man. We see a Rules Committee clothed with the power and responsibility of keeping them abreast with the growth of the substantive law. We see a set of rules free from the need of radical changes and reforms because of the gradual changes made as the needs are shown. During these many years the Rules Committee of England has modified or created an average of twelve rules per year.

On the other hand, in America we see in Federal suits at law and in more than half of the States an iron hand reaching out from the National capital or from the State capitals to command in what manner the administration of justice may proceed. The legislative omnipotence of Nation and State has not only exercised a proper power of creating Courts and defining their jurisdiction, either by constitution or statute, but it has gone far beyond this and prescribed by statute how this jurisdiction shall be exercised. I concede the right of the Legislative branches of Government to say what Courts may do, but I object when they attempt to say how the Courts shall do it.

By simply examining the surface, it would seem that the English people have developed increased confidence in their Bench and Bar while at the same time the American people have lost faith in theirs. This, I am quite sure, is not the case. I have no misgivings as to the confidence of the American people in the ability and integrity of the Bench and Bar of America. Of course, we cannot shut our eyes to the occasional disappointment of litigants when they see what appears to be a miscarriage of justice because of a technicality or a delay. Under such circumstances, it is quite natural that such disappointment should be charged to the administration of justice by the Bench and Bar without realizing that the Bench and the Bar may be administering justice in exactly the way that is prescribed by the representatives of the people in their Legislative Assemblies. If the American people have gone wrong in their Legislative Codes of procedure without knowing the result of their acts, the fault is not so much their fault as it is the fault of the Bench and the Bar. We have sat by and permitted a misdirection of legislative activity and have washed our hands of the responsibility because we did not participate. Just so long as the American Bar continues this attitude, just so long will the legislative mistake go on. Here and there we have heard the occasional voice crying out in the wilderness. Disciples have been comparatively few and Apostles have been fewer still.

By looking about us we can readily see that the Legislative Departments of Government are, generally speaking, in favor of the Rule-Making Power in recent years. Go to your State Statutes and you will find that every Industrial Accident Board and every Public Utilities Commission is given the right to prescribe rules to govern the exercise of its powers and in most instances these Boards and Commissions are composed of laymen. Go to your Federal Statutes and you will find the power to prescribe its own Rules of Practice and Procedure has been given to the Federal Power Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Board of Tax Appeals, the Board of General Appraisers, the Court of Customs Appeals, the Commerce Court, the Court of Claims, the United States Court for China, and the present Supreme Court of the District of Columbia. If the regular Courts are the only ones left to drag the ball and chain of legislative supervision, it can not be caused by an objection on the part of Legislatures to the granting of Rule-Making Powers. The facts show a contrary attitude. This being true, then indeed the fault must be with the Bench and Bar, and it is quite time that we took inventory of our short-comings and devised steps to cure them. It must be either that the Bench and Bar are not convinced of the merits of the Rule-Making power or that proper steps to convince the Legislative department of Government have not been taken. I do not stop to argue the merits of the Rule-Making system as applied to our ancient courts. This has been done by Pound and Sunderland and Shelton and others so often that argument on my part would be only to repeat, and the results in England, and also in this country when applied, furnish final proof of merit.

As I said in the beginning, interest in the mat-

ter is increasing but it will not increase in the manner and to the extent that its merits justify until you and I and every member of the American Bar are willing to stand up and be counted as ready to assume our individual responsibility. We must develop a greater consciousness of the fact that the Bench and the Bar of State and Nation, constitute the third Department of Government. The Executive Department has its responsibility. The Legislative Department has its responsibility. The responsibilty of the Judicial Department of Government is the administration of justice. If we are willing as a body to assume our responsibility for this Department of Government and convince the Executive and the Legislative Departments of Government of our good faith, I do not doubt that the Nation and the several States will clothe our Department of Government with full powers to perform its duties in the most efficient way. This good faith, however, cannot be assured simply by the protestation of individual lawyers. It must be done through an organized Bar. It does not matter whether this organization comes through incorporation or coordination, it will be enough if it is organized to a point of becoming effective. Whether we offer to perform our work through the agencies of the Judges alone or through the agencies of a Judicial Council, or through the agencies of an Organized Bar, it makes no difference. What will produce the best results in one State may not produce the best results in another. Each State must choose a method suited to its needs. In Massachusetts the effort is being made through a Judicial Council and you have made a start in that direction in Ohio. In the Federal Courts, it is going forward through a conference of judges. In Delaware we are proceeding by the co-operation of the Bench and the Bar.

At the last session of our Legislature the Delaware Bar prepared a statute which was enacted into law by the Legislative and Executive Departments of our State granting our Courts full and complete power to prescribe rules for practice and procedure in our Courts of Law. The statute consists of only one Section as follows:

"4164. Sec. 1. The Chief Justice and Associate Judges of the State of Delaware shall have power to prescribe and establish by general rules the process, writs, pleadings, verifications, motion and forms of action, and the practice and procedure in civil actions at law and in the rendition, whether at or during the first term or otherwise, entry, opening or vacating of judgments and orders therein. Said rules shall not abridge, enlarge or modify the substantive rights of any litigant. They shall take effect six months after their promulgation. Upon becoming effective they shall supersede all pleading, practice and procedure in conflict therewith. Upon becoming effective, all laws in conflict with such rules shall be of no further force or effect. The said Judges shall have power, from time to time, to supplement, abridge, modify, or amend such rules.

In all cases where by statute special forms of action, pleading or practice are prescribed for the enforcement of civil rights or titles, the process, writs, pleadings, verifications, motions and forms of action, and the practice, procedure, judgments and orders so prescribed by said general rules, shall be followed in lieu of the forms of action, pleading and practice so prescribed by statute.

Wherever by statute periods of limitation are imposed upon the bringing of named forms of action, the said periods of limitation, after going into effect of the rules so framed as aforesaid, shall apply to the actions prescribed by said rules for the enforcement of the rights, causes of action and remedies respectively enforceable by such named forms of action.

Whenever, under the provisions of existing law, an action survives, the action prescribed by said rules as a substitute therefor shall also survive."

I happened to be President of my State Bar Association at the time, and after a conference with the Judges, I appointed a special committee of the Bar Association to assist the Court in preparing the proposed rules. The Bar Committee has prepared two drafts of rules and has submitted these drafts to various various law schools in the country for criticism and suggestions. A third draft is now in preparation. The Judges are keeping in close touch with the work and it is expected that within a few months, a new set of rules will be promulgated under the Statute and thereupon the Delaware Bench and Bar will assume the full responsibility for the duties laid upon the Judicial Department of our little State.

It would be largely futile if the members of your Association simply met once a year to proclaim your creed of service and made proposals to the people of Ohio and to the Bar of your State. If your work is grounded only upon the opinions of the small proportion of your Bar that is attending this meeting, it will soon prove to be of little avail. It is for you to ground your work upon the foundation of the general opinion of the Ohio Bar. This opinion you must help make. You need a greater development of self-consciousness on the part of the Bar of your State. A self-consciousness based upon your responsibility as a group. You must recognize that you constitute the Judicial Department of your State Government. You must recognize that the Judicial Department of your Government was created by the whole people for the purpose of supplying the machinery of Government for the administration of justice under the laws for the whole people.

You must recognize that you have not been made a part of this machinery as attorneys at law simply for the purpose of furnishing yourself with a means of livelihood. You have been given this special privilege under obligations not only to a particular court or to a particular client, but as well to the whole people of Ohio from whom either directly or indirectly your business and your privilege come. When you recognize your responsibility as a class in charge of that Department, when you each recognize your responsibility as an individual in that class, then you will have laid the foundation for progress. In the assumption of your full responsibilities in the administration of justice you will have grounded the foundation for assuring the people of your State of your good faith and your earnestness of purpose. Then and not till then, may you expect the people through their other departments of Government to accept your judgment and follow your advice in those things that appertain to the administration of justice. Under the inspiration of this meeting may you rededicate yourselves to the cause of justice and it may be hoped that each of you will go forth a crusader in the cause to the end that the Ohio Bar may assume its rightful place in the Government of your great State.